17-378

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 247.

AUGUSTUS KOUNTZE, THOMAS WARDELL, AND JAMES W. BOSLER, PLAINTIFFS IN ERROR,

vs.

THE OMAHA HOTEL COMPANY, SMITH S. CALDWELL, CHARLES W. HAMILTON, GEORGE E. BARKER, E. D. PRATT, AND SYLVANUS WRIGHT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED AUGUST 3, 1880.

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1 Pleas in the circuit court of the United States in and for the eighth judicial circuit and district of Nebraska, before the honorable Elmer S. Dundy, judge of the district court of the United States for said district of Nebraska, sitting in said circuit court, at the term of May, 1880.

AUGUSTUS KOUNTZE, JAMES W. BOSLER, AND Thomas Wardell
vs.
THE OMAHA HOTEL COMPANY, SMITH S. CALDwell, Charles W. Hamilton, George E. Barker, E. D. Pratt, and Sylvanus Wright.

Be it remembered that on the first day of December, A. D. 1879, the plaintiffs above named filed in said circuit court an amended petition, which said amended petition is in the words and figures following, to wit:

2 *Amended petition.*

In the United States circuit court in the district of Nebraska.

AUGUSTUS KOUNTZE, JAMES W. BOSLER, AND Thomas Wardell
vs.
THE OMAHA HOTEL COMPANY, SMITH S. CALDwell, Charles W. Hamilton, George E. Barker, E. D. Pratt, and Sylvanus Wright.

Now come Augustus Kountze, James W. Bosler, and Thomas Wardell, plaintiffs, and complain of The Omaha Hotel Company, Smith S. Caldwell, Charles W. Hamilton, George E. Barker, E. D. Pratt, and Sylvanus Wright, defendants, and say that on the 24th day of September, 1873, Jeptha H. Wade and James W. Bosler exhibited their bill of complaint in this court, and impleaded as defendants therein the said The Omaha Hotel Company, Milton Rogers, Edward Creighton, Thomas Wardell, Augustus Kountze, Herman Kountze, Andrew J. Poppleton, Henry W. Yates, John Withnell, Richard Withnell, Samuel Cafferty, John I. Redick, Smith S. Caldwell, Alvin Saunders, Clinton Briggs, A. Sidney Paddock, Joseph Barker, jr., Sylvanus Wright, Edward E. Pratt, John A. Harbaugh, Charles W. Hamilton, George Thrall, Joseph C. Thomas, Henry C. Blair, Frederick Wirth, Joseph Kerner, John Steel, Ryerson H. Hillikee, Joel F. Kinney, Cicero Phelps, The Burlington and Missouri River Railroad Company of Iowa, and The Western Union Telegraph Company of the State of New York. In their said bill the said plaintiff therein alleged that the said Omaha Hotel Company was, on the 1st day of September, 1871, a corporation duly organized under the laws of the State of Nebraska, and on said day made its one hundred several bonds, by each whereof it acknowledged itself bound to pay to bearer $1,000, with interest at 12 per
3 cent. per annum, the principal payable in five years, with the privilege of paying the same in three years, the interest payable

semi-annually, on the first day of September and March of each year, to which bonds were attached interest coupons for the interest to accrue and become payable on said days respectively, and to secure the payment thereof made its certain deed of trust to Milton Rogers, as trustee, for the holders of said bonds, whereby it mortgaged and conveyed to said Rogers lots one and two in block one hundred and thirty-eight (138) in the city of Omaha; and the said plaintiffs alleged that they held of said bonds, the said Wade, thirty-five, and the said Bosler, forty, and that the said Wardell held twenty-five, and the said Edward Creighton, Poppleton, Augustus Kountze, Herman Kountze, and Yates held certain of said coupons detached from said bonds. And the said plaintiffs therein prayed that said company, and the defendants holding under it, be foreclosed of all right and equity of redemption in said premises, and that said premises be sold and the proceeds applied to pay the said bonds and coupons to the holders thereof, as their interests should thereafter appear to the said court.

2. Such proceedings were therein had that on the 8th day of May, 1875, this court rendered a decree in said cause, whereby, among other things, it was ordered, adjudged, and decreed that the said premises be sold and the proceeds be applied to pay, first, the costs, fees, commissions, and disbursements arising on said sale; second, the insurance and taxes accrued and to accrue on the premises prior to the sale; third, a judgment recovered by said Withnell, Withnell and Cafferty against said company for $10,000 and interest; fourth, the said bonds (less three thousand dollars) and interest, amounting at the date of said decree to $139,470, the said sum to be brought into court to be distributed among the holders of said
4 bonds; fifth, a judgment recovered by said Hillikee, Kinney, and Phelps against said company for $2,986.46 and interest; sixth, a judgment recovered by Clinton Briggs, trustee, against said company for $28,183.35, and also decreeing that the said company, and the defendants holding under it, be foreclosed of all right and equity of redemption in said premises.

3. The defendants therein, The Omaha Hotel Company, Smith S. Caldwell, John I. Redick, E. D. Pratt, Charles W. Hamilton, Clinton Briggs, Sylvanus Wright, Joseph Barker, junior, and A. Sidney Paddock, appealed from said decree to the Supreme Court of the United States, and in order to supercede the said decree and stay the sale therein ordered, pending the said appeal, on the 11th day of May, 1875, the said defendants herein, The Omaha Hotel Company, as principal, and Smith S. Caldwell, Charles W. Hamilton, George E. Barker, E. D. Pratt, and Sylvanus Wright, as sureties, made their certain bond or writing obligatory according to the course and practice of the said court and the acts of Congress in such case made and provided, and on that occasion the said defendants then and there, to wit, on the said 11th day of May, 1875, by their said bond or writing obligatory, a copy of which is hereto annexed, acknowledged themselves, the said Omaha Hotel Company, as principal, and the said Caldwell, Hamilton, Barker, Pratt, and Wright, as sureties, to be held and firmly bound to Jeptha H. Wade, James W. Bosler, John A. Creighton, administrator of the estate of Edward Creighton, deceased, Andrew J. Poppleton, Augustus Kountze, Herman Kountze, and Henry W. Yates, in the penal sum of fifty thousand dollars, to be paid to the said Wade, Bosler, Creighton, administrator, Poppleton, Kountze, Kountze,

and Yates, their certain attorney, executors, administrators, or assigns, with and upon certain conditions thereunder written, wherein it was recited that "in a cause in the circuit court of the United States for the district of Nebraska, in equity, depending in said court between
5 Jeptha H. Wade and James W. Bosler, plaintiffs, and the said Omaha Hotel Company and E. D. Pratt, S. S. Caldwell, Chas. W. Hamilton, Joseph Barker, jr., Sylvanus Wright, Algernon S. Paddock, Clinton Briggs, and John I. Redick, and others impleaded in it, a decree was ordered *again* against said hotel company et al.; said defendants and said hotel company in open court prayed an appeal from said decree to the Supreme Court of the United States, which appeal was allowed by said circuit court" (which cause, decree, and appeal so in the said bond or writing obligatory mentioned and referred to were the same cause, decree, and appeal hereinbefore mentioned and referred to), and the conditions aforesaid in the said bond or writing obligatory and under the obligation thereof written were as follows, that is to say: "Now the condition of this obligation is such that if the said Omaha Hotel Company shall prosecute said appeal to effect and pay said Jeptha H. Wade, James W. Bosler, Thomas Wardell, John A. Creighton, administrator of the estate of Edward Creighton, deceased, Andrew J. Poppleton, Augustus Kountze, Herman Kountze, and Henry W. Yates, their executors, administrators, or assigns, for the use and detention of the property covered by the mortgage in controversy in this suit during the pendency of the said appeal, and the costs of the suit, and the just damages for delay, and costs and interest on said appeal, if it fails to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue;" which bond was approved by a judge of said court, and being so by him approved, was on the 14th day of May, 1875, filed in the office of the clerk of the said court, where the same has ever since remained.

And thereupon the said decree was superseded and the said sale stayed pending the said appeal.

4. The said The Omaha Hotel Company, Pratt, Caldwell, Hamilton, Barker, Wright, Paddock, Briggs, and Redick duly prosecuted their
6 said appeal to the said Supreme Court, and such proceedings were thereupon had that at the term of October, 1877, to wit, on the 11th day of February, 1878, the said Supreme Court affirmed the said decree of the circuit court aforesaid in all things, with costs amounting to $293.47; and on the 26' day of February, 1878, a mandate issued out of the said Supreme Court directed to the judges of the said circuit court commanding them to proceed to enforce the said decree whereby the said bond or writing obligatory became forfeited.

5. Thereupon the said mandate being duly filed in said circuit court it did, on the 7th day of March, 1878, by its order and decree in that behalf in the said cause made and rendered, direct that its said decree be enforced, and such proceedings were thereupon had that the said premises were on the 18' day of April, 1878, sold by one of the masters thereof for $120,000.00; and afterwards, to wit, on the 16' day of May, 1878, it was ascertained and adjudged by the said court that the moneys realized on said sale were, after paying the costs, fees, disbursements, and commissions arising on said sale, and the said judgment recovered by the said Withnell, Withnell and Cafferty, insufficient to answer the amount

due on the said bonds and mortgage; and that the amount of the said deficiency was $88,480.65; and it was ordered, considered, adjudged, and decreed that the said plaintiffs August Kountze, James W. Bosler, and Thomas Wardell recover of the said Omaha Hotel Company the said sum of $88.480.65, with interest from the day last aforesaid at the rate of 12 per cent. per annum. The costs on said sale amounted to eleven hundred twenty-five and $\frac{67}{100}$ dollars.

And the said court did further by its said order ascertain, order, and decree that the said sum of $88,480.65 was payable and should be paid to these plaintiffs, and that they have execution therefor.

7 6. On the 16' day of May, 1878, these plaintiffs sued out of said court, under the seal thereof, a writ of execution directed to the marshal of said district, commanding him that of the goods and chattels, and for want thereof the lands and tenements, of the said Omaha Hotel Company it make the said sum of $88,480.65, with interest, so by these plaintiffs recovered as aforesaid, and have those moneys in the office of the clerk of said court within sixty days to render unto the parties entitled thereto, which writ being endorsed with the said sum and interest was on said day delivered to the said marshal to execute; that afterwards, and within the time in that behalf therein limited, the said marshal returned the said writ into the office of the said clerk with his proceedings in that behalf thereon endorsed, whereby he certified that he was unable within his said district to find any goods or chattels, lands or tenements of the said Omaha Hotel Company whereon to levy and make the said moneys, or any part thereof.

7. On the 11th day of May, 1875, and for one month thereafter, the said premises were of the full and fair value of $150,000 and over; that between said day and the 26th day of February, 1878, the said mortgage' premises depreciated in value $30,000 by reason first of falling out of repair, and secondly the general depreciation of real estate in said city. And pending said appeal the use and detention of said premises were of the value of $30,000.

8. The said Jeptha H. Wade, John A. Creighton, administrator as aforesaid, Andrew J. Poppleton, Herman Kountze, and Henry W. Yates have severally and each for himself assigned the said bond or writing obligatory and their respective interests therein and the moneys secured and promised thereby and to accrue therefrom to the said Augustus Kountze. The said defendants have not nor has either of them paid the said sum of $50,000 or any part thereof to the said plaintiffs, or any or either of them,

8 although often requested so to do, but have wholly neglected and refused so to do, to the damage of the said plaintiff $75,000.

Wherefore the said plaintiffs pray judgment against the said defendants for $75,000, with costs of suit.

J. M. WOOLWORTH,
P'lff's Att'y.

DISTRICT OF NEBRASKA, *ss:*

J. M. Woolworth, being duly sworn, says he is the attorney for the plaintiffs in the above amended petition; that they and each of them are non-residents of and absent from said district, and he believes the facts stated therein to be true.

J. M. WOOLWORTH.

Subscribed in my presence and sworn to before me this first day of December, 1879.

WATSON B. SMITH, *Clerk.*

Know all men by these presents that we, The Omaha Hotel Company, as principal, and S. S. Caldwell, Charles W. Hamilton, George Barker, E. D. Pratt, Sylvanus Wright, as sureties, are held and firmly bound unto Jeptha H. Wade, James W. Bosler, Thomas Wardell, John A. Creighton, administrator of the estate of Edward Creighton, deceased, Andrew J. Poppleton, Augustus Kountze, Herman Kountze, and Henry W. Yates, in the full and just sum of fifty thousand and five hundred dollars, to be paid to said Wade, Bosler, Wardell, Creighton, administrator, Poppleton, Kountze, Kountze and Yates, their certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, and the successors of said hotel company, jointly and severally, by these presents. Sealed with our own seals anddated this 11th day of May, A. D. 1875.

9 Whereas lately, in a cause in the circuit court of the United States for the district of Nebraska, in equity, depending in said court between said Jeptha H. Wade and James W. Bosler, plaintiffs, and the said Omaha Hotel Company and E. D. Pratt, S. S. Caldwell, Chas. W. Hamilton, Joseph Barker, jr., Sylvanus Wright, Algernon S. Paddock, Clinton Briggs, and John I. Redick, and others impleaded with it, a decree was rendered against said hotel company et al. said defendants; and said hotel company, in open court, prayed an appeal from said decree to the Supreme Court of the United States, which appeal was allowed by said circuit court:

Now, the condition of the said obligation is such that if the said Omaha Hotel Company shall duly prosecute said appeal to effect, and pay said Jeptha H. Wade, James W. Bosler, Thomas Wardell, John A. Creighton, administrator of the estate of Edward Creighton, deceased, Andrew J. Poppleton, Augustus Kountze, Herman Kountze, and Henry W. Yates, their executors, administrators, or assigns, for the use and detention of the property covered by the mortgage in controversy in this suit, during the pendency of said appeal, and the costs of the suit, and just damages for delay, and costs and interest on said appeal, if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE OMAHA HOTEL CO.,
[SEAL.] By S. S. CALDWELL, *President.*
GEORGE E. BARKER, *Secretary.*
S. S. CALDWELL.
CHAS. W. HAMILTON.
GEORGE E. BARKER.
E. D. PRATT.
SYLVANUS WRIGHT.

10 In the United States circuit court for the district of Nebraska, the Hon. Elmer S. Dundy presiding, the within bond was presented to him for approval, and by said judge approved.

ELMER S. DUNDY, *Judge.*

Said amended petition is endorsed in words and figures following, to wit: No. 28, E. In United States circuit court, district of Nebraska. Augustus Kountze et al. vs. The Omaha Hotel Co. et al. J. M. Woolworth. Amended petition. Filed Dec. 1, 1879. Watson B. Smith, clerk.

Thereupon, afterwards, to wit, on the 15th day of December, 1879, an amended answer was filed in said case, which said amended answer is in words and figures following, to wit:

Amended answer.

In the circuit court of the United States for the district of Nebraska.

AUGUSTUS KOUNTZE ET ALS., PLAINTIFF',
vs.
THE OMAHA HOTEL CO. ET ALS., DEFENDANTS.

And now come the defendants, each for himself and itself, and for answer to the amended petition herein filed, allege:

That in the year 1870 the defendant, the hotel company, was by law created a corporation for the sole purpose of erecting and operating a hotel in the city of Omaha, and for no other; said propery consisting of two lots and the improvements thereon; that it was not the owner at that time, and never has been since, of any other property; that the mortgage mentioned in the petition covered its entire property of every kind and nature.

Defendants, further answering, say that at the master's sale of said
11 premises the said bondholders bid in said premises in the name of Augustus Kountze, who holds the title thereto in trust for them.

Defendants further say that it was a condition of the stay of execution, by the terms of said decree, that the defendants should pay all taxes, assessments levied, or to be levied, on said premises during the pendency of said appeal, and keep the hotel insured for one hundred thousand dollars, for the benefit of said bondholders, which conditions defendants allege have been in every respect complied with.

And defendants further say that pending said appeal they used every care and diligence possible to protect said property, and see to it that it would produce the largest possible amount of rentals, and say in that way they received the largest rental income from it that it could have been made to produce, which amounted to about fifteen thousand dollars net.

Defendants further allege that in May, 1875, the said corporation was utterly and totally insolvent; that if said property had been sold in May or June, 1875, not one dollar could have been made out of said hotel company by execution or other process at law or in equity after exhausting the mortgage premises.

Defendants deny that the rental value of said premises, pending said appeal, was thirty thousand dollars, as in said petition set forth; and deny that, between the 8th of May, 1875, and the 16th day of April, 1878, said premises depreciated in value thirty thousand dollars, by reason of the falling out of repair, but allege the fact to be that during that time and prior thereto these defendants kept said premises in first-class condition and re-

pair; and to that end and purpose, and for its protection and preservation, expended upon said premises between thirty and forty thousand dollars; and deny that said premises during that time has depreciated
12 thirty thousand dollars by reason of the general depreciation of real estate in said city; but allege that it was worth more and sold for more in April, 1878, than it was worth or would have sold for in May or June, 1875, or at any time intermediate or between said dates.

Admit that after the sale of said premises there was a deficiency of 88,000 and over, and that an execution was issued and put into the hands of the U. S. marshal, and that he returned the same, but allege that he made the return the same day he received it.

Defendants, further answering, say that the said Creighton, Yates, Poppleton, Wade, may have assigned their interest in the bond sued on, but said assignment was merely colorable and without consideration.

And defendants further allege that said corporation has not acquired any other property of any kind since May, 1875, but has continued utterly insolvent as aforesaid; allege they have paid the judgment of the Supreme Court, to wit, costs, and are not indebted to plaintiffs in any sum whatever, and pray to be dismissed with their costs expended.

CLINTON BRIGGS,
REDICK AND REDICK,
Atty's for Def'd't.
J. L. WEBSTER,
Of Counsel for Def'd't Wright.

UNITED STATES OF AMERICA,
State and District of Nebraska, ss:

S. S. Caldwell, being first duly sworn, deposes and says:

I am *of* one of the defendants in the above-entitled action; I know the contents of the foregoing answer, and the facts therein stated are true, as I verily believe.

S. S. CALDWELL.

13 Subscribed in my presence and sworn to before me this 15th day of Dec'r, 1879.

[SEAL.] JAMES S. FRANCE,
Notary Public.

Said amended answer is endorsed as follows: No. 28, E. Circ. court U. S., dist. of Nebraska. Augustus Kountze et al., pl'ff's, vs. The Omaha Hotel Company et als., def'd'ts. Amended answer. Filed Dec'r 15, 1879. Watson B. Smith, clerk. Clinton Briggs, Redick and Redick, def'd't' att'ys.

Thereupon, afterwards, to wit, on the 27th day of January, 1880, a reply was filed in said case, which said reply is in words and figures following, to wit:

Reply.

In the United States circuit court, district of Nebraska.

AUGUSTUS KOUNTZE ET AL
vs.
THE OMAHA HOTEL CO. ET AL.

Now comes the said plaintiffs, by J. M. Woolworth, their attorney, and for reply to the amended answer filed herein deny that said hotel company was not in 1870, or has not since been, the owner of any other property that that covered by the mortgage in the said petition and answer referred to, or that such mortgage covered its entire property, or that at the master's sale the bondholders bid in said premises in the name of Augustus Kountze, or that he holds the same in trust for them, or that, pending the said appeal, they, or any of them, used every or any care or diligence possible to protect said property, or see to it that it would produce the largest possible amount of rental, or that they, or any of them, received the largest rental income from it that it could be made to produce;
14 but said plaintiffs say that said defendants received a large sum, to wit, $30,000, over and above all payments made by them on account of said premises and the rent thereof, or that if said property had been sold in May or June, 1875, not one dollar could have been made out of said hotel company by execution or other process at law or in equity after exhausting said mortgaged premises, or that pending said appeal the said defendant kept said premises in first-class or proper condition or repair, or to that end or purpose, or for its protection or preservation, expended upon said premises between $30,000 and $40,000, or any other sum whatever, or that the assignment by the said Creighton, Yates, Poppleton, Wade, in the amended petition mentioned, was merely colorable or without consideration, or that since 1875 said company has not acquired any other property.

J. M. WOOLWORTH,
Pl'ff's' Att'y.

DISTRICT OF NEBRASKA, *ss:*

J. M. Woolworth, being duly sworn, says he is the attorney for the plaintiff in above reply; that they are non-residents of and absent from the district, and he believes the facts stated in said reply are true.

J. M. WOOLWORTH.

Subscribed in my presence and sworn to before me this 27th day of January, 1880.

WATSON B. SMITH, *Clerk.*

Said reply is endorsed as follows: No. 28, E. Circuit court U. S., district of Nebraska. Augustus Kountze et al., pl'ffs, vs. The Omaha Hotel Company et al., def'ts. Reply. Filed Jan'y 27, 1880. Watson B. Smith, clerk.

Thereupon, afterwards, at the January term of said court, and on
15 the 27th day of January, 1880, said cause came on to be tried to the

court and a jury, and the trial of said cause was continued from day to day until the 30th day of January, 1880, when the following proceedings were had, as appears of record on folio 203 et seq., journal F, of said court, to wit:

Verdict.

AUGUSTUS KOUNTZE ET AL.
vs.
THE OMAHA HOTEL CO. ET AL.

Now on this day came into open court the jury empanelled and sworn herein, and present to the court their verdict in writing, which is in words and figures following, to wit:

In the United States circuit court, dist. of Nebraska.

AUGUSTUS KOUNTZE ET AL.
vs.
THE OMAHA HOTEL CO. ET AL.

1. We, the jury, empanelled and sworn to try this cause, do find that the rental value of lots 1 & 2, in block 138, in the city of Omaha, with the improvements thereon, was, from the 21st of July, 1875, to May 8th, 1878, the sum of $38,241.95, on which sum interest at the rate of ten per cent. per annum from the receipt thereof to this day is the sum of $6,596.72.

And the defendants paid, during said period, for taxes $8,308.50; and insurance, $9,434.24; necessary expenses in renting premises and for necessary repairs, $4,502.74; interest therein, $3,837.26.

SAMUEL G. OWEN, *Foreman.*

2. We, the jury, do further find that the value of the said premises on the 8th day of May, 1875, was $92,500.00; interest on said sum from the said 21st day of July, 1875, to May 8th, 1878, is $25,874.28,
16 and that interest thereon from May 8th, 1878, to this day, at 10 per cent. per annum, amounts to the sum of $4,463.26; and the value of the said premises on the 18th of April, 1878, was $139,000.00, by reason of the increase of the value of said premises.

SAMUEL G. OWEN, *Foreman.*

3. We, the jury, do further find the said premises would, at a master's sale thereof in May, June, or July, 1875, have sold for $62,000.00, and the interest on which sum, from the 21st day of July, 1875, to May 8th, 1878, amounts to the sum of $17,342.76, which sum, with interest thereon from May 8th, 1878, to this day, amount to $20,334.35.

SAMUEL G. OWEN, *Foreman.*

4. We, the jury, do further find that the interest on $139,470, at 12 per cent. per annum, from May 8th, 1875, to the 8th of May, 1878, amounts to $50,209.20, and that sum, together with interest on the same, at 10 per cent. per annum, from said last day to this day, amount to $58,870.25.

SAMUEL G. OWEN, *Foreman.*

5. We, the jury, do further find that $50,000, together with interest thereon, at 10 per cent. per annum, from July 11th, 1878, to this date, is $57,750.00.

SAMUEL G. OWEN, *Foreman.*

6. We, the jury, do further find that the amount of costs of the case of Wade and others vs. The Omaha Hotel Co. and others, which are unpaid by the defendants, is $530.00.

SAMUEL G. OWEN, *Foreman.*

17 7. We, the jury, do further find that The Omaha Hotel Company, on the 8th day of May, 1875, was, and ever since has been, insolvent, and possessed of no property aside from said lots one and two, in block one hundred and thirty-eight, in the city of Omaha, out of which any judgment could have been collected.

SAMUEL G. OWEN, *Foreman.*

8. If, upon the pleadings and the above facts, the plaintiffs are entitled to recover, we, the jury, assess their damages at such sum as they are, upon the said pleadings and findings, entitled to recover.

SAMUEL G. OWEN, *Foreman.*

Thereupon, afterwards, at the May term of said court, on the 29th day of May, 1880, the following proceedings were had in said case, as appears of record on folio 399, journal F, of said court.

Judgment on verdict.

AUGUSTUS KOUNTZE, THOMAS WARDELL, AND James W. Bosler
vs.
THE OMAHA HOTEL CO., SMITH S. CALDWELL, Charles W. Hamilton, George E. Barker, E. D. Pratt, and Sylvanus Wright.

The jury in this action having heretofore, to wit, on the 30th day of January, 1880, returned a special verdict herein, and said defendants having filed a motion for judgment on said verdict, and the same having been argued and submitted, and taken by the court under advisement:

18 It is now, on this 29th day of May, 1880, ordered and adjudged by the court that the said plaintiffs, Augustus Kountze, Thomas Wardell, and James W. Bosler, recover from the said defendants, The Omaha Hotel Company, Smith S. Caldwell, Charles W. Hamilton, George E. Barker, E. D. Pratt, and Sylvanus Wright, the sum of nineteen thousand seven hundred thirty-five and $\frac{93}{100}$ dollars ($19,735.93), (said amount includes interest from the rendition of said verdict to this date) with the costs of this suit, the same to be taxed by the clerk.

And it is ordered that the property seized in attachment in this cause be sold to satisfy this judgment.

Thereupon each of the parties herein, by their attorneys, except to this order and judgment of the court.

Thereupon afterwards, to wit, on the 31st day of May, 1880, a bill of exceptions was filed in said case, which said bill of exceptions is in words and figures following, to wit:

In the circuit court of the United States for the district of Nebraska.

AUGUSTUS KOUNTZE AND OTHERS, PLAINTIFFS,
vs.
THE OMAHA HOTEL COMPANY AND OTHERS,
defendants.

And now at the May term, A. D. 1880, of the said court, and on this 29th day of May, A. D. 1880, before the Hon. Elmer S. Dundy, judge, presiding, came on to be heard and decided the motion of the plaintiffs that judgment be entered in their favor and against the defendants upon the verdict heretofore rendered in this action, and according thereto, for the sum of $57,750, being the amount of the penal sum of the bond in controversy herein, with interest thereon, as found in and by said
19 verdict, together with interest on said sum of $57,750 from the date of said verdict to this day, and the same was argued by counsel.

Whereupon the court ruled and decided that in accordance with said verdict the plaintiffs were entitled to judgment against the defendants for the rental value of lots 1 and 2, block 138, in the city of Omaha, with the improvements thereon, as therein found, less the aggregate sums as therein found paid by the defendants for taxes and insurance and necessary expenses in renting the premises and for necessary repairs, and interest thereon as found by said verdict, and for the additional sum of $530, as found by said verdict on account of costs unpaid by the defendants, and for no other or greater sum, except interest accrued on said verdict since the rendition thereof, and ordered that judgment be rendered accordingly.

To which order and decision of the court that the plaintiffs were not entitled to judgment for any other or greater sum than as aforesaid the plaintiffs did then and there duly except.

Whereupon the plaintiffs moved that this their bill of exceptions be duly signed and sealed, which is accordingly done by the judge of said court on this 31st day of May, A. D. 1880.

(Signed) ELMER S. DUNDY, *Judge.*

Said bill of exceptions is endorsed as follows: No. 28 E. Circuit court U. S., dist. of Neb. Augustus Kountze et al. vs. The Omaha Hotel Co. et al. Bill of exceptions. Filed May 31, 1880. Watson B. Smith, clerk. The bond of the plaintiffs on writ of error is fixed at $500.00. Elmer S. Dundy, judge.

Thereupon afterwards, to wit, on the 30th day of June, 1880, a bond was filed in said case, which said bond is in words and figures following, to wit:

20 Know all men by these presents that we, Augustus Kountze, Thomas Wardell, James W. Bosler, Herman Kountze, & Henry W. Yates, are held and firmly bound unto The Omaha Hotel Company, Smith S. Caldwell, Charles W. Hamilton, Sylvanus Wright, E. D. Pratt, & George Barker in the full and just sum of five hundred dollars, to be

paid to the said Omaha Hotel Company, Smith S. Caldwell, Charles W. Hamilton, Sylvanus Wright, E. D. Pratt, & George Barker, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 30th day of June, in the year of our Lord one thousand eight hundred and eighty.

Whereas, lately, at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between Augustus Kountze, Thomas Wardell, and James W. Bosler, plaintiffs, and The Omaha Hotel Company, Smith S. Caldwell, Charles W. Hamilton, Sylvanus Wright, E. D. Pratt, and George Barker, defendants, a judgment was rendered by said court in favor of said plaintiffs against said defendants, and said plaintiffs having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendants citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next:

Now, the condition of the above obligation is such that if the said Augustus Kountze, Thomas Wardell, & James W. Bosler shall prosecute said writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

AUGUSTUS KOUNTZE,
THOMAS WARDELL, &
JAMES W. BOSLER,
By J. M. WOOLWORTH, *Their Att'y.*
HENRY W. YATES.
HERMAN KOUNTZE.

Approved by—

ELMER S. DUNDY, *Judge.*

(Indorsed:) No. 28 E. United States circuit court, district of Nebraska. Augustus Kountze et al. vs. The Omaha Hotel Co. et al. Bond. Filed June 30th, 1880. Watson B. Smith, clerk.

21 Thereupon on said 30th day of June, 1880, a writ of error was allowed and a citation issued in said case of which the following are the originals, to wit:

22 UNITED STATES OF AMERICA,
District of Nebraska, ss:

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, in a certain civil action between Augustus Kountze, Thomas Wardell, and James W. Bosler, plaintiffs, and The Omaha Hotel Company, Smith S. Caldwell, Charles W. Hamilton, Sylvanus Wright, E. D. Pratt, and George Barker, defendants, a manifest error hath happened, to the great damage

of the said plaintiffs in the said cause, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 30th day of June, 1880.

WATSON B. SMITH, *Clerk.*

Allowed by—

ELMER S. DUNDY, *Judge.*

(Indorsed:) No. 28 E. United States circuit court, district of Nebraska. Augustus Kountze et al. vs. The Omaha Hotel Co. et al. Writ of error. Filed June 30, 1880. Watson B. Smith, clerk.

23 THE UNITED STATES OF AMERICA,
District of Nebraska, ss:

To the Omaha Hotel Company, Smith S. Caldwell, Charles W. Hamilton, Sylvanus Wright, E. D. Pratt, and George Barker, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein Augustus Kountze, Thomas Wardell, & James W. Bosler are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff' in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Omaha, this 30th day of June, 1880.

ELMER S. DUNDY, *Judge.*

(Indorsed:) No. 28, E. United States circuit court, district of Nebraska. Augustus Kountze et al. vs. The Omaha Hotel Co. et al. Citation. Filed July 7th, 1880. Watson B. Smith, clerk.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 6th day of July, 1880, I received this citation, and on the 6th day of July, 1880, I served the same upon the within-named defendants by John I. Redick, their solicitor, in Douglas County, State and district of Nebraska, by delivering to and

leaving with him a certified copy thereof, with all the endorsements thereon.

WILLIAM DAILY,
United States Marshal for the District of Nebraska,
By H. S. MOODY,
Deputy United States Marshal.

Marshal's costs, $2.06.

(Indorsed:) Filed July 7, 1880.

WATSON B. SMITH, *Clerk.*

24 UNITED STATES OF AMERICA,
District of Nebraska, ss:

By virtue of the foregoing writ of error, and in obedience thereto, I, Watson B. Smith, clerk of the circuit court of the United States for the district of Nebraska in the eighth circuit, do hereby certify that the above and foregoing folios from one to 23 contain true and faithful transcripts of pleadings, process, and proceeding of record and on file in my office as said clerk, and the whole thereof and the endorsements thereon, in the case of Augustus Kountze et al. vs. The Omaha Hotel Co. et al., and that a copy of the writ of error and citation has been lodged and the same remain on file in my said office.

Witness my hand and the seal of said circuit court, at Omaha, this 20th day of July, A. D. 1880.

[SEAL.]

WATSON B. SMITH,
Clerk Circuit Court U. S., Dist. of Nebraska.

(Indorsement on cover:) No. 247. Augustus Kountze, Thomas Wardell, & James W. Bosler, plaintiffs in error, vs. The Omaha Hotel Company, Smith S. Caldwell, Charles W. Hamilton, George E. Barker, E. D. Pratt, and Sylvanus Wright. Nebraska C. C. U. S. Filed 3rd August, 1880.

17-378

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 244. + 247

THE OMAHA HOTEL COMPANY, SMITH S. CALDWELL, CHARLES W. HAMILTON, SYLVANUS WRIGHT, E. D. PRATT, AND GEORGE E. BARKER, PLAINTIFFS IN ERROR,

vs.

AUGUSTUS KOUNTZE, THOMAS WARDELL, AND JAMES W. BOSLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED JUNE 24, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 244.

THE OMAHA HOTEL COMPANY, SMITH S. CALDWELL, CHARLES W. HAMILTON, SYLVANUS WRIGHT, E. D. PRATT, AND GEORGE E. BARKER, PLAINTIFFS IN ERROR,

vs.

AUGUSTUS KOUNTZE, THOMAS WARDELL, AND JAMES W. BOSLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

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1 Pleas in the circuit court of the United States in and for the eighth judicial circuit and district of Nebraska, before the honorable Elmer S. Dundy, judge of the district court of the United States for said district of Nebraska, sitting in said circuit court, at the term of May, 1880.

AUGUSTUS KOUNTZ, JAMES W. BOSLER, AND Thomas Wardell
vs.
THE OMAHA HOTEL COMPANY, SMITH S. CALDwell, Charles W. Hamilton, George E. Barker, E. D. Pratt, and Sylvanus Wright.

Be it remembered that on the first day of December, A. D. 1879, the plaintiffs above named filed in said circuit court an amended petition, which said petition is in the words and figures following, to wit:

Amended petition.

In the United States circuit court in the district of Nebraska.

AUGUSTUS KOUNTZ, JAMES W. BOSLER, AND Thomas Wardell
vs.
THE OMAHA HOTEL COMPANY, SMITH S. CALDwell, Charles W. Hamilton, George E. Barker, E. D. Pratt, and Sylvanus Wright.

2 Now come Augustus Kountze, James W. Bosler, and Thomas Wardell, plaintiffs, and complain of The Omaha Hotel Company, Smith S. Caldwell, Charles W. Hamilton, George E. Barker, E. D. Pratt, and Sylvanus Wright, defendants, and say that on the 24th day of September, 1873, Jeptha H. Wade and James W. Bosler exhibited their bill of complaint in this court, and impleaded as defendants therein the said The Omaha Hotel Company, Milton Rogers, Edward Creighton, Thomas Wardell, Augustus Kountze, Herman Kountze, Andrew J. Poppleton, Henry W. Yates, John Withnell, Richard Withnell, Samuel Cafferty, John I. Redick, Smith S. Caldwell, Alvin Saunders, Clinton Briggs, A. Sidney Paddock, Joseph Barker, jr., Sylvanus Wright, Edward E. Pratt, John A. Harbaugh, Charles W. Hamilton, George Thrall, Joseph C. Thomas, Henry C. Blair, Frederick Wirth, Joseph Kirner, John Steel, Ryerson H. Hillikee, Joel F. Kinney, Cicero Phelps, The Burlington and Missouri River Railroad Company of Iowa, and The Western Union Telegraph Company of the State of New York. In their said bill the said plaintiff therein alleged that the said Omaha Hotel Com-
3 pany was, on the 1st day of September, 1871, a corporation duly organized under the laws of the State of Nebraska, and on said day made its one hundred several bonds, by each whereof *whereof* it acknowledged itself bound to pay to bearer $1,000, with interest at 12 per cent. per annum, the principal payable in five years, with the privilege of paying the same in three years, the interest payable

semi-annually, on the first day of September and March of each year, to which bonds were attached interest coupons for the interest to accrue and become payable on said days respectively, and to secure the payment thereof made its certain deed of trust to Milton Rogers, as trustee, for the holders of said bonds, whereby it mortgaged and conveyed to said Rogers lots one and two in block one hundred and thirty-eight (138), in the city of Omaha; and the said plaintiffs alleged that they held of said bonds, the said Wade, thirty-five, and the said Bosler, forty, and that the said Wardell held twenty-five, and the said Edward Creighton, Poppleton, Augustus Kountze, Herman Kountze, and Yates held certain of said coupons detached from
4 said bonds. And the said plaintiffs therein prayed that said company, and the defendants holding under it, be foreclosed of all right and equity of redemption in said premises, and that said premises be sold and the proceeds applied to pay the said bonds and coupons to the holders thereof, as their interests should thereafter appear to the said court.

2. Such proceedings were therein had that on the 8th day of May, 1875, this court rendered a decree in said cause, whereby, among other things, it was ordered, adjudged, and decreed that the said premises be sold and the proceeds be applied to pay, first, the costs, fees, commissions, and disbursements arising on said sale; second, the insurance and taxes accrued and to accrue on the premises prior to the sale; third, a judgment recovered by said Withnell, Withnell and Cafferty, against said company, for $10,000 and interest; fourth, the said bonds (less three thousand dollars) and interest, amounting, at the date of said decree, to $139,470, the said sum to be brought into court to be distributed among the holders of said bonds; fifth, a judgment recovered by said Hillikee, Kinney and Phelps,
5 against said company, for $2,986.46 and interest; sixth, a judgment recovered by Clinton Briggs, trustee, against said company, for $28,183.35, and also decreeing that the said company, and the defendants holding under it, be foreclosed of all right and equity of redemption in said premises.

3. The defendants therein, The Omaha Hotel Company, Smith S. Caldwell, John I. Redick, E. D. Pratt, Charles W. Hamilton, Clinton Briggs, Sylvanus Wright, Joseph Barker, junior, and A. Sidney Paddock, appealed from said decree to the Supreme Court of the United States, and in order to supertede the said decree and stay the sale therein ordered, pending the said appeal on the 11th day of May, 1875, the said defendants herein, The Omaha Hotel Company as principal, and Smith S. Caldwell, Charles W. Hamilton, George E. Barker, E. D. Pratt, and Sylvanus Wright, as sureties, made their certain bond or writing obligatory according to the course and practice of the said court and the acts of Congress in such case made and provided, and on that occasion the said defendants then and
6 there, to wit, on the said 11th day of May, 1875, by their said bond or writing obligatory, a copy of which is hereto annexed, acknowledged themselves, the said Omaha Hotel Company as principal, and the said Caldwell, Hamilton, Barker, Pratt, and Wright, as sureties, to be held and firmly bound to Jeptha H. Wade, James W. Bosler, John A. Creighton, administrator of the estate of Edward Creighton, deceased, Andrew J. Poppleton, Augustus Kountze, Herman Kountze, and Henry W. Yates, in the penal sum of fifty thousand dollars, to be paid to the said Wade, Bosler, Creighton, administrator, Poppleton, Kountze, Kountze

and Yates, their certain attorney, executors, administrators, or assigns, with and upon certain conditions thereunder written, wherein it was recited that "in a cause in the circuit court of the United States for the district of Nebraska, in equity, depending in said court between Jeptha H. Wade and James W. Bosler, plaintiffs, and the said Omaha Hotel Company and E. D. Pratt, S. S. Caldwell, Chas. W. Hamilton, Joseph Barker, jr., Sylvanus Wright, Algernon S. Paddock, Clinton Briggs, and John I. Redick, and others impleaded in it, a decree was ordered
7 again against said hotel company et al., said defendants and said hotel company in open court prayed an appeal from said decree to the Supreme Court of the United States, which appeal was allowed by said circuit court" (which cause, decree, and appeal so in the said bond or writing obligatory mentioned and referred to were the same cause, decree, and appeal hereinbefore mentioned and referred to), and the conditions aforesaid in the said bond or writing obligatory and under the obligation thereof written were as follows, that is to say: "Now the condition of this obligation is such that if the said Omaha Hotel Company shall prosecute said appeal to effect and pay said Jeptha H. Wade, James W. Bosler, Thomas Wardell, John A. Creighton, administrator of the estate of Edward Creighton, deceased, Andrew J. Poppleton, Augustus Kountze, Herman Kountze, and Henry W. Yates, their executors, administrators, or assigns, for the use and detention of the property covered by the mortgage in controversy in this suit, during the pendency of the said appeal, and the costs of the suit, and the just damages for delay, and costs and
8 interest on said appeal, if it fails to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue;" which bond was approved by a judge of said court, and being so by him approved, was on the 14th day of May 1875, filed in the office of the clerk of the said court, where the same has ever since remained.

And thereupon the said decree was superseded and the said sale stayed pending the said appeal.

4. The said The Omaha Hotel Company, Pratt, Caldwell, Hamilton, Barker, Wright, Paddock, Briggs, and Redick duly prosecuted their said appeal to the said Supreme Court, and such proceedings were thereupon had that at the term of October, 1877, to wit, on the 11th day of February, 1878, the said Supreme Court affirmed the said decree of the circuit court aforesaid in all things with costs amounting to $293.47; and on the 26' day of February, 1878, a mandate issued out of the said Supreme Court directed to the judges of the said circuit court commanding them to proceed to enforce the said decree whereby the said bond writing obligatory became forfeited.

9 5. Thereupon the said mandate being duly filed in said circuit court it did, on the 7th day of March, 1878, by its order and decree in that behalf in the said cause made and rendered, direct that its said decree be enforced, and such proceedings were thereupon had that the said premises were on the 18' day of April, 1878, sold by one of the masters thereof for $120,000.00; and afterwards, to wit, on the 16' day of May, 1878, it was ascertained and adjudged by the said court that the moneys realized on said sale were, after paying the costs, fees, disbursements, and commissions arising on said sale, and the said judgment recovered by the said Withnell, Withnell and Cafferty, insufficient to answer the amount

due on the said bonds and mortgage; and that the amount of the said deficiency was $88,480.65; and it was ordered, considered, adjudged, and decreed that the said plaintiffs August Kountze, James W. Bosler, and Thomas Wardell recover of the said Omaha Hotel Company the said sum of $88.480.65, with interest from the day last aforesaid at the rate of 12 per cent. per annum. The costs on said sale amounted to eleven hundred twenty-five and $\frac{67}{100}$ dollars.

10 And the said court did further by its said order ascertain, order, and decree that the said sum of $88,480.65 was payable and should be paid to these plaintiffs, and that they have execution therefor.

6. On the 16' day of May, 1878, these plaintiffs sued out of said court, under the seal thereof, a writ of execution directed to the marshal of said district, commanding him that of the goods and chattels, and for want thereof the lands and tenements, of the said Omaha Hotel Company it make the sum of $88,480.65, with interest, so by these plaintiffs recovered as aforesaid, and have those moneys in the office of the clerk of said court within sixty days to render unto the parties entitled thereto, which writ being endorsed with the said sum and interest was on said day delivered to the said marshal to execute; that afterwards, and within the time in that behalf therein limited, the said marshal returned the said writ into the office of the said clerk with his proceedings in that behalf thereon endorsed, whereby he certified that he was unable within his said district to find any goods or chattels, lands or tenements of the said Omaha Hotel Com-

11 pany whereon to levy and make the said moneys, or any part thereof.

7. On the 11th day of May, 1875, and for one month thereafter the said premises were of the full and fair value of $150,000 and over; that between said day and the 26th day of February, 1878, the said mortgage' premises depreciated in value $30,000 by reason first of falling out of repair, and secondly the general depreciation of real estate in said city. And pending said appeal the use and detention of said premises were of the value of $30,000.

8. The said Jeptha H. Wade, John A. Creighton, administrator as aforesaid, Andrew J. Poppleton, Herman Kountze, and Henry W. Yates have severally and each for himself assigned the said bond or writing obligatory and their respective interests therein and the moneys secured and promised thereby and to accrue therefrom to the said Augustus Kountze. The said defendants have not no' has either of them paid the sum of $50,000 or any part thereof to the said plaintiffs, or any or either of them, although often requested so to do, but have wholly neglected and refused so to do, to the damage of the said plaintiff $75,000.

12 Wherefore the said plaintiffs pray judgment against the said defendants for $75,000, with costs of suit.

J. M. WOOLWORTH,
P'lff's Att'y.

DISTRICT OF NEBRASKA, *ss:*

J. M. Woolworth, being duly sworn, says he is the attorney for the plaintiffs in the above amended petition; that they and each of them are non-residents of and absent from said district, and he believes the facts stated therein to be true.

J. M. WOOLWORTH.

Subscribed in my presence and sworn to before me this first day of December, 1879.

WATSON B. SMITH, *Clerk.*

Know all men by these presents that we, The Omaha Hotel Company, as principal, and S. S. Caldwell, Charles W. Hamilton, George Barker, E. D. Pratt, Sylvanus Wright, as sureties, are held and firmly bound unto Jeptha H. Wade, James W. Bosler, Thomas Wardell, John A. Creighton, administrator of the estate of Edward Creighton, deceased, Andrew J. Poppleton, Augustus Kountze, Herman Kountze, and Henry W. Yates, in the full and just sum of fifty thousand and five hundred dollars, to
13 be paid to said Wade, Bosler, Wardell, Creighton, administrator, Poppleton, Kountze, Kountze and Yates, their certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, and the successors of said Omaha Hotel Company, jointly and severally, by these presents. Sealed with our seals and dated this 11th day of May, A. D. 1875.

Whereas lately, in a cause in the circuit court of the United States for the district of Nebraska, in equity, depending in said court between said Jeptha H. Wade and James W. Bosler, plaintiffs, and the said Omaha Hotel Company and E. D. Pratt, S. S. Caldwell, Chas. W. Hamilton, Joseph Barker, jr., Sylvanus Wright, Algernon S. Paddock, Clinton Briggs, and John I. Redick, and *and* others impleaded with it, a decree was rendered against said hotel company et al. said defendants; and said hotel company, in open court, prayed an appeal from said decree to the Supreme Court of the United States, which appeal was allowed by said circuit court:

Now, the condition of the said obligation is such that if the said
14 Omaha Hotel Company shall duly prosecute said appeal to effect, and pay said Jeptha H. Wade, James W. Bosler, Thomas Wardell, John A. Creighton, administrator of the estate of Edward Creighton, deceased, Andrew J. Poppleton, Augustus Kountze, Herman Kountze, and Henry W. Yates, their executors, administrators, or assigns, for the use and detention of the property covered by the mortgage in controversy in this suit, during the pendency of said appeal, and the costs of the suit, and just damages for delay, and costs and interest on said appeal, if it fails to make good its plea, this obligation shall be void; otherwise to remain in full force and virtue.

THE OMAHA HOTEL CO.,
[SEAL.] By S. S. CALDWELL, *President.*
GEORGE E. BARKER, *Secretary.*
S. S. CALDWELL.
CHAS. W. HAMILTON.
GEORGE E. BARKER.
E. D. PRATT.
SYLVANUS WRIGHT.

In the United States circuit court for the district of Nebraska, the Hon. Elmer S. Dundy presiding, the within bond was presented to him for approval, and by said judge approved.

ELMER S. DUNDY, *Judge.*

15 Said amended petition is endorsed as follows, to wit: No. 28. E. In United States circuit court, district of Nebraska. Augustus Kountze et al. vs. The Omaha Hotel Co. et al. J. M. Woolworth. Amended petition. Filed Dec. 1, 1879. Watson B. Smith, clerk.

Thereupon, afterwards, to wit, on the 15th day of December, 1879, an amended answer was filed in said case, which said amended answer is in words and figures following, to wit:

Amended answer.

In the circuit court of the United States for the district of Nebraska.

AUGUSTUS KOUNTZE ET ALS., PLAINTIFFS,
vs.
THE OMAHA HOTEL CO. ET ALS., DEFENDANTS.

And now come the defendants, each for himself and itself, and for answer to the amended petition herein filed, allege:

That in the year 1870 the defendant, the hotel company, was by law created a corporation for the sole purpose of erecting and operating a hotel in the city of Omaha, and for no other; said property consisting of two lots and the improvements thereon; that it was not the owner at that time, and never has been since, of any other property; that the mort-

16 gage mentioned in the petition covered its entire property of every kind and nature.

Defendants, further answering, say that at the master's sale of said premises the said bondholders bid in said premises in the name of Augustus Kountze, who holds the title thereto in trust for them.

Defendants further say that it was a condition of the stay of execution, by the terms of said decree, that the defendants should pay all taxes, assessments levied, or to be levied, on said premises during the pendency of said appeal, and keep the hotel insured for one hundred thousand dollars, for the benefit of said bondholders, which conditions defendants allege have been in every respect complied with.

And defendants further say that pending said appeal they used every care and diligence possible to protect said property, and see to it that it would produce the largest possible amount of rentals, and say in that way they received the largest rental income from it that it could have been made to produce, which amounted to about fifteen thousand dollars net.

Defendants further allege that in May, 1875, the said corporation was utterly and totally insolvent; that if said property had been sold

17 in May or June, 1875, not one dollar could have been made out of said hotel company by execution or other process at law or in equity after exhausting the mortgage premises.

Defendants deny that the rental value of said premises, pending said appeal, was thirty thousand dollars, as in said petition set forth; and deny that, between the 8th of May, 1875, and the 16th day of April, 1878, said premises depreciated in value thirty thousand dollars, by reason of the falling out of repair, but allege the fact to be that during that time and prior thereto these defendants kept said premises in first-class condition and repair; and to that end and purpose, and for its protection and preservation, expended upon said premises between thirty and forty thousand dol-

lars; and deny that said premises during that time has depreciated thirty thousand dollars by reason of the general depreciation of real estate in said city; but allege that it was worth more and sold for more in April, 1878, than it was worth, or would have sold for in May or June, 1875, or at any time intermediate or between said dates.

Admit that after the sale of said premises there was a deficiency of $88,000 and over, and that an execution was issued and put into the
18 hands of the U. S. marshal, and that he returned the same, but allege that he made the return the same day he received it.

Defendants, further answering, say that said Creighton, Yates, Poppleton, Wade, may have assigned their interest in the bond sued on, but said assignment was merely colorable and without consideration.

And defendants further allege that said corporation has not acquired any other property of any kind since May, 1875, but has continued utterly insolvent as aforesaid; allege they have paid the judgment of the Supreme Court, to wit, costs, and are not indebted to plaintiffs in any sum whatever, and pray to be dismissed with their costs expended.

CLINTON BRIGGS,
REDICK AND REDICK,
Atty's for Def'd't.
J. L. WEBSTER,
Of Counsel for Def'd't Wright.

UNITED STATES OF AMERICA,
State and District of Nebraska, ss:

S. S. Caldwell, being first duly sworn, deposes and says:

I am one of the defendants in the above-entitled action; I know the contents of the foregoing answer, and the facts therein stated are true,
19 as I verily believe.

S. S. CALDWELL.

Subscribed in my presence and sworn to before me this 15th day of Dec'r, 1879.

[SEAL.] JAMES S. FRANCE,
Notary Public.

Said amended answer is endorsed as follows: No. 28, E. Circ. court U. S. dist. of Nebraska. Augustus Kountze et als., def'ts. Amended answer. Filed Dec'r 15, 1879. Watson B. Smith, clerk. Clinton Briggs, Redick and Redick, def'd'ts' att'ys.

Thereupon, afterwards, to wit, on the 27th day of January, 1880, a reply was filed in said case, which said reply is in words and figures following, to wit:

Reply.

In the United States circuit court, district of Nebraska.

AUGUSTUS KOUNTZE ET AL
vs.
THE OMAHA HOTEL CO. ET AL.

Now comes the said plaintiffs, by J. W. Woolworth, their attorney, and

for reply to the amended answer filed herein, deny that said hotel company was not in 1870, or has not since been, the owner of any other property that that covered by the mortgage, in the said petition and
20 answer referred to, or that such mortgage covered its entire property, or that at the master's sale the bondholders bid in said premises in the name of Augustus Kountze, or that he holds the same in trust for them, or that, pending the said appeal, they, or any of them, used every or any care or diligence possible to protect said property, or see to it that it would produce the largest possible amount of rental, or that they, or any of them, received the largest rental income from it that it could be made to produce; but said plaintiffs say that said defendants received a large sum, to wit, $30,000, over and above all payments made by them on account of said premises and the rent thereof, or that if said property had been sold in May or June, 1875, not one dollar could have been made out of said hotel company by execution or other process at law or in equity after exhausting said mortgaged premises, or that pending said appeal the said defendant kept said premises in first-class or proper condition or repair, or to that end or purpose, or for its protection or preservation, expended upon said premises between $30,000 and $40,000, or any other sum whatever, or that the assignment by the said Creighton, Yates, Poppleton, Wade, in the amended petition mentioned, was merely
21 colorable or without consideration, or that since 1875 said company has not acquired any other property.

J. M. WOOLWORTH,
Pl'ff's Att'y.

DISTRICT OF NEBRASKA, *ss:*

J. M. Woolworth, being duly sworn, says he is the attorney for the plaintiff in above reply; that they are non-residents of and absent from the district, and he believes the facts stated in said reply are true.

J. M. WOOLWORTH.

Subscribed in my presence and sworn to before me this 27th day of January, 1880.

WATSON B. SMITH, *Clerk.*

Said reply is endorsed as follows: No. 28, E. Circuit Court U. S., district of Nebraska. Augustus Kountze et al., pl'ffs, vs. The Omaha Hotel Company et al., def'ts. Reply. Filed Jan'y 27th, 1880. Watson B. Smith, clerk.

Thereupon, afterwards, at the January term of said court, and on the 27th day of January, 1880, said cause came on to be tried to the court and a jury, and the trial of said cause was continued from day to day until the 30th day of January, 1880, when the following proceedings were had, as appears of record on folio 203 et seq., journal F, of said court, to wit:

22 *Verdict.*

AUGUSTUS KOUNTZE ET AL.
vs.
THE OMAHA HOTEL CO. ET AL.

Now on this day came into open court the jury empanelled and sworn

herein, and present to the court their verdict in writing; which is in words and figures following, to wit:

In the United States circuit court, dist. of Nebraska.

AUGUSTUS KOUNTZE ET AL.
vs.
THE OMAHA HOTEL CO. ET AL.

1. We, the jury, empanelled and sworn to try this cause, do find that the rental value of lots 1 & 2, in block 138, in the city of Omaha, with the improvements thereon, was, from the 21st of July, 1875, to May 8th, 1878, the sum of $38,241.95, on which sum interest at the rate of ten per cent. per annum from the receipt thereof to this day is the sum of $6,596.72.

And the defendants paid, during said period, for taxes $8,308.50; and insurance, $9,434.24; necessary expenses in renting premises, and for necessary repairs, $4,502.74; interest thereon, $3,837.26.

SAMUEL G. OWEN, *Foreman.*

23 2. We, the jury, do further find that *that* the value of the said premises on the 8th day of May, 1875, was $92,500.00; interest on said sum from the said 21st day of July, 1875, to May 8th, 1878, is $25,874.28, and that interest thereon from May 8th, 1878, to this day, at 10 per cent. per annum, amounts to the sum of $4,463.26; and the value of the said premises, on the 18th of April, 1878, was $139,000.00, by reason of the increase of the value of said premises.

SAMUEL G. OWEN, *Foreman.*

3. We, the jury, do further find the said premises would, at a master's sale thereof in May, June, or July, 1875, have sold for $62,000.00, and the interest on which sum, from the 21st day of July, 1875, to May 8th, 1878, amounts to the sum of $17,342.76, which sum, with interest thereon from May 8th, 1878, to this day, amounts to $20,334.35.

SAMUEL G. OWEN, *Foreman.*

4. We, the jury, do further find that the interest on $139,470, at 12 per cent. per annum, from May 8th, 1875, to the 8th of May, 1878, amounts to $50,209.20, and that sum, together with interest on the same, at 10 per cent. per annum, from said last day to this day, amounts to $58,870.25.

SAMUEL G. OWEN, *Foreman.*

5. We, the jury, do further find that $50,000, together with in-
24 terest thereon, at 10 per cent. per annum, from July 11th, 1878, to this date, is $57,750.00.

SAMUEL G. OWEN, *Foreman.*

6. We, the jury, do further find that the amount of costs of the case of Wade and others vs. The Omaha Hotel Co. and others, which are unpaid by the defendants, is $530.00.

SAMUEL G. OWEN, *Foreman.*

7. We, the jury, do further find that The Omaha Hotel Company, on the 8th day of May, 1875, was, and ever since has been, insolvent, and possessed of no property aside from said lots one and two, in block one hundred and thirty-eight, in the city of Omaha, out of which any judgment could have been collected.

SAMUEL G. OWEN, *Foreman.*

8. If, upon the pleadings and the above facts, the plaintiffs are entitled to recover, we, the jury, assess their damages at such sum as they are, upon the said pleadings and findings, entitled to recover.

SAMUEL G. OWEN, *Foreman.*

Thereupon, afterwards, at the May term of said court, on the
25 29th day of May, 1880, the following proceedings were had in said case, as appears of record on folio 399, journal F, of said court.

Judgment on verdict.

AUGUSTUS KOUNTZE, THOMAS WARDELL, AND James Bosler,
vs.
THE OMAHA HOTEL CO., SMITH S. CALDWELL, Charles W. Hamilton, George E. Barker, E. D. Pratt, and Sylvanus Wright.

The jury in this action having heretofore, to wit, on the 30th day of January, 1880, returned a special verdict herein and said defendants having filed a motion for judgment on said verdict, and the same having been argued and submitted, and taken by the court under advisement:

It is now, on this 29th day of May, 1880, ordered and adjudged by the court that the said plaintiffs, Augustus Kountze, Thomas Wardell, and James W. Bosler, recover from the said defendants, The Omaha Hotel Company, Smith S. Caldwell, Charles W. Hamilton, George E. Barker, E. D. Pratt, and Sylvanus Wright, the sum of nineteen thousand seven hundred thirty-five and $\frac{93}{100}$ dollars ($19,735.93), (said amount includes interest from the rendition of said verdict to this date) with the costs of this suit, the same to be taxed by the clerk.

26 And it is ordered that the property seized in attachment in this cause be sold to satisfy this judgment.

Thereupon each of the parties herein by their attorneys, except to this order and judgment of the court.

Thereupon afterwards, to wit, on the 31st day of May, 1880, a bill of exceptions was filed in said case, which said bill of exceptions is in words and figures following, to wit:

In the circuit court of the United States for the district of Nebraska.

AUGUSTUS KOUNTZE ET ALS., PLAINTIFFS,
vs.
THE OMAHA HOTEL COMPANY, ET ALS., DEFENDANTS.

And now at the May term, A. D., 1880, of the said court, and on this

29th day of May, A. D. 1880, before the Hon. Elmer S. Dundy, judge presiding, came on to be heard and decided the motion of the defendants that judgment be entered in their favor and against the plaintiffs upon the verdict heretofore rendered in this action, and according thereto, and for costs, and the same was argued by counsel.

27 Whereupon the court ruled and decided that said motion be overruled, to which ruling of the court that the defendants were not entitled to judgment on said verdict, and according thereto, the defendants did then and there duly except.

And said cause coming on further to be heard, and on the same day, upon the motion of the plaintiffs that judgment be entered in their favor on said verdict, and said motion was argued by counsel. And the court thereupon ruled and decided that said motion be sustained, and that in accordance with said verdict, the plaintiffs were entitled to judgment against the defendant for the rental value of lots one and two, in block one hundred and thirty-eight in the city of Omaha with the improvements thereon, as therein found, less the aggregate sums as therein found paid by the defendants for taxes and insurance, and necessary expenses in renting the premises and for necessary repairs, and interest thereon as found by said verdict, and for the additional sum of five hundred and thirty dollars as found by said verdict on account of costs unpaid by said defendants, except

28 interest accrued on said verdict since the rendition thereof, and ordered that judgment be rendered accordingly, to which decision, finding, and order of the court in sustaining said motion and finding in favor of the plaintiffs as aforesaid, and ordering judgment accordingly, the defendants then and there duly excepted.

Whereupon the defendants moved that this, their bill of exceptions, be duly signed, and sealed, which is accordingly done by the judge of said court on this 31st day of May, A. D. 1880.

[SEAL] ELMER S. DUNDY, *Judge.*

Said bill of exceptions endorsed as follows: No. 28 E. circuit court U. S. dist. of Nebr. Augustus Kountze, et al., pl'ffs, vs. The Omaha Hotel Co. et al., def'd'ts. Bill of exceptions. Filed May 31, 1880. Watson B. Smith, clerk.

Thereupon, afterwards, on the 31st day of May, 1880, a writ of error was allowed and issued in said case of which the following is the original.

29 UNITED STATES OF AMERICA,
District of Nebraska, ss:

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, in a certain civil action between Augustus Kountze, Thomas Wardell, and James W. Bosler, plaintiffs, and The Omaha Hotel Company, Smith S. Caldwell, Charles W. Hamilton, Sylvanus Wright, E. D. Pratt, and George E. Barker, defendants, a manifest error hath happened, to the great damage of the said defendants in the said cause, as by their complaint appears:

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held; that, the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States shall be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this thirty-first day of May, 1880.

WATSON B. SMITH, *Clerk.*

Allowed by—

ELMER S. DUNDY, *Judge.*

(Indorsed:) No. 28 E. United States circuit court district of Nebraska. Augustus Kountzé et al. vs. The Omaha Hotel Co. et al. Writ of error. Filed May 31, 1880. Watson B. Smith, clerk.

30 Thereupon, afterwards, on the 9th day of July, 1880, a bond was filed in said case, which said bond, with endorsements thereon, is in words and figures following, to wit:

31 Know all men by these presents, that we, The Omaha Hotel Company, Smith S. Caldwell, Charles W. Hamilton, E. D. Pratt, George E. Barker, Sylvanus Wright, M. T. Barlow, and James S. France, are held and firmly bound unto Augustus Kountze, Thomas Wardell, and James W. Bosler, in the full and just sum of six hundred dollars, to be paid to the said Augustus Kountze, Thomas Wardell, and James W. Bosler, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this ninth day of July, in the year of our Lord one thousand eight hnndred and eighty.

Whereas, lately, at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between Augustus Kountze, Thomas Wardell, and James W. Bosler, plaintiffs, and The Omaha Hotel Company, Smith S. Caldwell, Charles W. Hamilton, E. D. Pratt, George E. Barker, Sylvanus Wright, defendants, a judgment was rendered be said court in favor of said plaintiffs and against said defendants, and said defendants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said defendants citing and admonishing to be and appear at a Supreme Court of the United States, to by holden at Washington on the 2nd Monday of October next:

Now, the condition of the above obligation is such that if the said Omaha Hotel Company, Smith S. Caldwell, Charles W. Hamilton, E. D. Pratt, George E. Barker, and Sylvanus Wright shall prosecute said writ

to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

OMAHA HOTEL COMPANY,
By SMITH S. CALDWELL, *President.*
SYLVANUS WRIGHT AND
E. D. PRATT,
By CLINTON BRIGGS, *their att'y.*
CHARLES W. HAMILTON.
SMITH S. CALDWELL.
M. T. BARLOW.
JAMES S. FRANCE.

Approved by—

ELMER S. DUNDY, *Judge.*

(Indorsed:) No. 28 E. United States circuit court district of Nebraska. Augustus Kountze et al. vs. The Omaha Hotel Co. et al. Bond. Filed July 9th, 1880. Watson B. Smith, clerk.

32 Thereupon on said 9th day of July, 1880, a citation was issued in said case, of which the following is the original with the original return of service thereof.

33 THE UNITED STATES OF AMERICA,
District of Nebraska, ss:

To Augustus Kountze, Thomas Wardell, and James W. Bosler, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein The Omaha Hotel Company, Smith S. Caldwell, Charles W. Hamilton, Sylvanus Wright, E. D. Pratt, and George E. Parker are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff" in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Omaha, this 9th day of July, 1880.

ELMER S. DUNDY, *Judge.*

(Indorsed:) No. 28. E. United States circuit court, district of Nebraska. Augustus Kountze et al. vs. The Omaha Hotel Co. et al. Citation. Filed July 12, 1880. Watson B. Smith, clerk.

DISTRICT OF NEBASKA, *ss:*

I hereby certify and return that on the 9th day of July, 1880, I received this citation, and on the 10th day of July, 1880, I served the same upon the within-named defendants by E. Wakely, their attorney of record, in Douglas County, State and district of Nebraska, by delivering to

and leaving with him a certified copy thereof with all the endorsements thereon.

WILLIAM DAILY,
United States Marshal for the District of Nebraska,
By H. S. MOODY,
Deputy United States Marshal.

Marshal's costs, $4.06.

(Indorsed:) Filed July 12, 1880. Watson B. Smith, clerk.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 9th day of July, 1880, I received this citation, and on the 10th day of July, 1880, I served the same upon the within-named defendants by J. M. Woolworth, their attorney of record, in Douglas County, State and district of Nebraska, by leaving a certified copy thereof, with all the endorsements thereon, at the usual place of business of the said attorney, with an adult person in charge of the office of said attorney.

WILLIAM DAILY,
United States Marshal for the District of Nebraska,
By H. S. MOODY,
Deputy United States Marshal.

Marshal's costs, $.

(Indorsed:) Filed July 12, 1880. Watson B. Smith, clerk.

34 UNITED STATES OF AMERICA,
District of Nebraska, ss:

By virtue of the foregoing writ of error, and in obedience thereto, I, Watson B. Smith, clerk of the circuit court of the United States for the district of Nebraska in the eighth circuit, do hereby certify that the above and foregoing folios from 1 to 33 contain true and faithful transcripts of pleadings, process, and proceedings of record and on file in my office as said clerk, and the whole thereof and the endorsements thereon, in the case of Augustus Kountze et al. vs. The Omaha Hotel Co. et al., and that a copy of the writ of error and citation has been lodged and the same remain on file in my said office.

Witness my hand and the seal of said circuit court, at Omaha, this 20th day of July, A. D. 1880.

[SEAL.]

WATSON B. SMITH,
Clerk Circuit Court U. S., Dist. of Nebraska.

(Indorsement on cover:) No. 244. The Omaha Hotel Company, Smith S. Caldwell, Charles W. Hamilton, Sylvanus Wright, E. D. Pratt, and George E. Barker, plaintiffs in error, vs. Augustus Kountze, Thomas Wardell, and James W. Bosler. Nebraska C. C. U. S. Filed 24th July, 1880.

OFFICE SUPREME COURT U. S.
FILED
APR 5 1883
JAMES H. McKENNEY, Clerk

17-378

In the United States Supreme Court.

AUGUSTUS KOUNTZE, *et al.*,
Original Plaintiffs and Plaintiffs in Error,
vs.
THE OMAHA HOTEL COMPANY, *et al.*
No. 247.

THE OMAHA HOTEL COMPANY, *et al.*,
Original Defendants and Plaintiffs in Error,
vs.
AUGUSTUS KOUNTZE, *et al.*
No. 244.

BRIEF AND POINTS FOR ORIGINAL PLAINTIFFS.

These are writs of error to the Circuit Court of the United States, for the District of Nebraska.

Upon the pleadings the following facts appear:

On the 24th of September, 1873, Jeptha H. Wade and James W. Bosler exhibited their bill in equity against the Omaha Hotel Company, and others, for the foreclosure of a mortgage made by the Company to one Rogers, as trustee, to secure its one hundred coupon bonds, each for $1000, which were held, thirty-five by Wade, and forty by Bosler, the plaintiffs, and twenty-five by Wardell, who was impleaded as a defendant. Edward Creighton, Andrew J. Poppleton, Augustus Kountze, Herman Kountze and Henry W. Yates were also impleaded as defendants, as holders of certain coupons detached from the bonds.

So, too, certain other parties were impleaded as incumbrancers, and among them Withnell and others, who claimed a prior lien.

On the 8th of May, 1875, a decree of foreclosure and sale was rendered, by which $139,470 was found due on the mortgage debt, and after providing for the payment of costs and fees, and of the prior lien of the Withnells, it directed that the sum of $139,470 arising on the sale be brought into Court for distribution among the holders of the bonds and coupons.

Thereupon an appeal was taken and allowed against said decree to this Court, and on the 11th day of May, 1875, the Hotel Company as principal, and Caldwell, Hamilton, Barker, Pratt and Wright gave the bond which is here sued on.

The penal sum of the bond was $50,000, that being the amount fixed by the Court. It ran to Wade, Bosler, John A. Creighton, as administrator of the estate of Edward Creighton, deceased, Poppleton, the two Kountzes, and Yates, and recited that "in a cause in the Circuit Court of the United States for the District of Nebraska, in equity, depending in said Court, between Jeptha H. Wade and James W. Bosler, plaintiffs, and the said Hamilton Joseph Barker, jr., Sylvanus Wright, Algernon S. Paddock, Clinton Briggs, and John I. Redick and others impleaded in it, a decree was ordered *against* said Hotel Company *et al.*: said Hotel Company in open Court prayed an appeal from said decree to the Supreme Court of the United States, which appeal was allowed by said Circuit Court."

The condition of the bond was as follows: "Now the condition of this obligation is such that if the said Omaha Hotel Company shall prosecute said appeal to effect and pay said Jeptha H. Wade, James W. Bosler, Thomas Wardell, John A. Creighton, administrator of the estate of Edward Creighton, deceased, Andrew J. Poppleton, Augustus Kountze, Herman Kountze, and Henry W. Yates, their executors, administrators, or assigns, for the use and detention of the property covered by the mortgage in controversy in this suit during the pendency of the said appeal, and the costs of the suit, and the just damages for delay, and costs and interest on said appeal, if it fails to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue."

Thereupon the execution of the decree was superseded, and the sale stayed pending the appeal.

On the 11th of February, 1878, the decree was affirmed, with $293.47 costs. (*Hotel Co. vs. Wade*, 99 U. S. 13.) The mandate having gone down and been duly entered in the Circuit Court, on the 18th of April, 1878, the premises were sold by one of the masters for $120,000. After applying the proceeds as directed by the decree, there was a deficiency of $88,480.65 upon the sum found by the decree to be due to the bondholders.

The interests in the appeal bond of Wade, Poppleton, Yates, and Herman Kountze have been assigned to Augustus Kountze.

The action was brought on the bond. At the January term, 1880, the cause was tried before the Hon. Elmer S.

Dundy and a jury, when a special verdict was found, as follows:

1. We, the jury, empanelled and sworn to try this cause, do find that the rental value of lots 1 and 2, in block 138, in the city of Omaha, with the improvements thereon, was, from the 21st of July, 1875, to May 8th, 1878, the sum of $38,241.95, on which sum interest at the rate of ten per cent. per annum from the receipt thereof to this day is the sum of $6,596.72. And the defendants paid during said period for taxes $8,308.50; and insurance $9,434.24; necessary expenses in renting premises and for necessary repairs, $4,502.74: interest thereon, $3,837.26.

2. We, the jury, do further find that the value of the said premises on the 8th day of May, 1875, was $92,500.00; interest on said sums from the said 21st day of July, 1875, to May 8th, 1878, is $25,874.28, and that interest thereon from May 8th, 1878, to this day, at ten per cent. per annum, amounts to the sum of $4,463.26; and the value of the said premises on the 18th of April, 1878, was $139,000.00, by reason of the increase of the value of said premises.

3. We, the jury, do further find the premises would, at a Master's sale thereof in May, June or July, 1875, have sold for $62,000, and the interest on which sum, from the 21st day of July, 1875, to May 8th, 1878, amounts to the sum of $17,342.76, which sum with interest thereon from May 8th, 1878, to this day, amount to $20,334.35.

4. We, the jury, do further find that the interest on $139,470, at 12 per cent. per annum, from May 8th, 1875,

to the 8th of May, 1878, amounts to $50,209.20, and that sum, together with interest on the same, at 10 per cent. per annum, from said last day to this day, amount to $58,870.25.

5. We, the jury, do further find that $50.000, together with interest thereon at 10 per annum, from July 11th, 1878, to this date, is $57,750.00.

6. We, the jury, do further find that the amount of costs of the case of *Wade, et al. vs. The Omaha Hotel Company, et. al.*, which are unpaid by the defendants, is $530.00.

7. We, the jury, do further find that the Omaha Hotel Company, on the 8th day of May, 1875, was, and ever since has been, insolvent, and possessed of no property aside from said lots one and two, in block one hundred and thirty-eight, in the city of Omaha, out of which any judgment could have been collected.

8. If, upon the pleadings and the above facts, the plaintiffs are entitled to recover, we, the jury, assess their damages at such sums as they are, upon the said pleadings and findings, entitled to recover.

Thereupon the plaintiffs moved for judgment for $57,750, the full amount of the penal sum of the bond, with interest from the time the action was brought, and the defendant moved for judgment in their favor.

The court held that the plaintiffs were entitled only to the rental value of the mortgaged premises pending the appeal, less expenses, and gave judgment therefor.

Both parties sued out writs of error.

I.

Let the case be looked at, in the first place, simply as one arising on contract, entered into by the parties of their own motion. Regarding the case as of that nature, we shut out of view all the provisions of law relating to bonds given to supersede judgments. We attended only to the contract expressed in the bond. That contract was this: The plaintiffs in the decree having a right to an immediate sale of the mortgage premises, the obligors, in the bond in consideration of delay of sale, pending their appeal to this court, promised in case the decree were affirmed here to pay the obligees for the use and detention of the property during the period of the delay the costs of the suit, just damages for delay, and costs and interest on the appeal, the whole not to exceed $50.000.

This undertaking possesses all the elements of a valid and binding contract.

1. The parties were competent to contract; the obligors on the one side, and the obligees on the other.

2. The obligors entered into the contract voluntarily. They were under no compulsion. There is neither allegation nor proof of duress. The rule is elementary, that in order to avoid his bond, a defendant must aver and prove the matter on which he relies for the purpose. But there is more here than silence on the part of these defendants. The circumstances show that this bond was their voluntary act. The decree was rendered May 8. The bond was approved and filed May 11. The law allowed sixty days, that is until July 8, for superseding the decree by the bond.

So that it was not given under the stress of an impending sale. The defendants drew it of their own motion; they selected the form of words which expressed their obligation. The whole thing was their own doing.

U. S. vs. Tingley, 5 Peters 114.
U. S. vs. Bradley, 10 *Ib.* 043.
U. S. vs. Linn, 15 *Ib.* 290.
U. S. vs. Hodson, 10 Wall. 395.

3. The undertaking of the defendants was supported by a good consideration; namely, that the plaintiffs in the decree would forbear execution of the decree. Even if the plaintiffs might have disregarded the bond as not in due form or moved the court to set the supersedeas aside, yet accepting it as legal and binding, the defendants received the advantage which they sought.

U. S. vs Linn, 15 Peters 290, 314.
Montville vs. Haughton, 7 Conn. 543, 549.
Geddeng vs. Barney, 31 Ohio St. 78.
Rynearson vs. Fredenburg, 42 Mich. 412.
The State vs. Cannon, 34 Iowa 322.

4. The contract contravened no provision of law. Neither the statute nor the rule declared that a bond should be void if not in the form which they prescribed. There was no principle of morality or of public policy which stood in the way of the parties contracting as they did.

U. S. vs. Tingley, 5 Peters 114, 128.
U. S. vs. Bradtey, 10 *Ib.* 343, 360.
U. S. vs. Linn, 15 *Ib.* 290, 315.
U. S. vs. Hodson, 10 Wall. 395, 406.

II.

The bond being good as a common law contract, we proceed, secondly, to inquire whether its effect is limited by the fact that the statute and the rule prescribe the condition of supersedeas bonds. The law provides that the bond shall be conditioned to prosecute the appeal to effect and pay all damages and costs; in this bond the obligors covenanted to pay for the use and detention of the property, costs of the suit, and on the appeal, just damages for delay, and interest on the appeal. It is said that this is more than the statute required; that the statute required the defendants to pay costs of appeal and damages for delay, but did not call for the use or detention of the property pending the appeal, nor for the interest which should accrue on the mortgage debt during that period. The question comes to this: The statute prescribing the condition of the bond, and the parties undertaking in broader terms, is their obligation limited to the statutory requirements?

1. There are many cases arising on such bonds in which it is said that conditions in excess of the statute may be rejected and the bond enforced to the extent of the terms thereof which are within the statutory provisions. But those cases did not require more than that the undertakings which were within the statute should be enforced. It was sufficient for the purposes of the cases that the undertakings which were within the statute should be enforced without regard to those which were beyond the statute, and that is all that was intended by saying that the latter would be rejected.

2. Bonds to secure the performance of a public duty have been enforced in many cases where the statute did not provide for them.

Montville vs. Haughton, 7 Conn. 543.
Commonwealth vs. Wolbut, 6 Binny, 292.
The Brig Struggle, 1 Gal. 476.
Wolfe vs. McClure, 79 Ill. 564.

3. So, undertakings not executed according to the statute have been enforced; as where the requirement was a bond, and a writing without a seal, and held by the court not to be a bond, was held good.

U. S. vs. Linn, 15 Peters 290, 311.

So where the bond ran to the selectmen of the town instead of to the town.

Sweetser vs. Hay, 2 Gray 49.
Horn vn. Whittier, 6 N. H. 88.
Thomas vs. White, 12 Mass. 369.

So, where two sureties were required and only one was taken.

Beausage's Case, 10 Coke 99.
Austin vs. Howard, 7 Taunt 28.
Bank vs. Dandrige, 12 Whea. 81.

If a security not within the statute may be enforced as a common law obligation, it is not easy to see why a bond having some of its conditions beyond the statute should not be enforced to the full extent of its terms. In fact it is absurd to say that a bond is not good as a statutory bond but is a good common law bond; and then limit its operation and effect by the statute. If rejected under the statute and maintained on general principles, it must

be tried not by the statute but by its own terms. It cannot be half fish and half fowl.

III.

But the case does not compel us to make out this point Let it be admitted that damages cannot be recovered on conditions which are in excess of the statute. The conditions in this bond which are within the statute give us damages equal to the penal sum. The phraseology of the conditions is not that prescribed by the statute or the rule, but their meaning is within the terms of the law. This leads to an inquiry into what is the nature of the damages which the law intends to allow to the plaintiffs.

1. When a judgment at law is recovered in the circuit court for a sum of money, the payment of which is not secured, and the defendant sues out his writ of error and desires it to operate as a supersedeas, he gives a bond with sureties conditioned to prosecute his writ of error and pay all damages and costs. Failing to reverse the judgment, his sureties are by reason of these terms bound to pay the whole amount of the judgment. That is to say, the defendant by the terms of the bond in which he agreed to pay "all damages" in case he did not prosecute his writ of error undertook to pay the whole judgment.

Catlett vs. Brodie, 9 Whea. 553.
Stafford vs. Union Bank, 10 How. 139.
S. C., 17, *Ib.* 275.
Ives vs. Merchants Bank, 12, *Ib.* 159, 163.
Many vs. Siser, 6 Gray, 141.
Ex-parte French 100 U. S. 4.

And the same is true if the sum of money be recovered by a decree in chancery.

Sessions vs. Pintaid, 18 How. 106, 109.

2. When the recovery is wholly or partially secured by property held or pledged for it, the condition of the bond is the same: it is still to prosecute the appeal to effect and pay all damages and costs. The damages which are recoverable under a bond given to supersede a decree, whether for unsecured money or for secured money, are provided for by the same terms. In both cases the defendant agrees to pay "all damages," that is, the whole sum recovered.

But under the statute and under the rule, the judge signing the citation, fixes the penal sum of the bond. In doing this he may take into account the security which the plaintiff has already; if the debt be wholly secured by property a small sum is sufficient for a large decree; if half of the debt be so secured a bond for half the debt would be enough. The recovery which may be had on the bond in case of its forfeiture is, of course, limited by the penalty, but the terms of the conditions call for the whole debt remaining unsatisfied by the property. They being the same as in a bond to supersede a judgment for unsecured money stand for the whole amount of the decree within the penal sum. If the property which stands as security realize a part of the debt, the amount will of course be credited, and the deficiency will be recovered against the bondsmen. That deficiency here is $88,480.65.

3. There are two judgments of this court which are supposed to conflict with this view of the law. But it is

believed that if they are rightly considered such is not the case.

Jerome vs. McCarter, 21 Wall. 17, was before the court on a motion to increase the bond given on the appeal, and for additional security. The original suit was for the foreclosure of a third mortgage on a large body of lands. A decree was rendered finding the mortgage debt much more than $1,000,000, and directed a sale, subject to prior liens amounting to at least $1,500,000. Upon the application to the court below to fix the penal sum of the appeal bond to operate as a supersedeas, the two contending parties filed affidavits, one set showing the property to be immensely valuable, and the other that it was not worth over $2,500,000.

The question submitted to the court was, what the penal sum of the bond should be under the circumstances. It was not what the conditions of the bond should be, for that was prescribed by the statute: nor what damages were recoverable on the bond, for that could not arise until suit upon it. The former rule on that subject, that the damages were the amount of the judgment and interest, was not modified. The justice of the decision is evident; if the property was as valuable as one side insisted, the mortgage debt was well secured by it, and a bond in a small penalty was sufficient for the indemnity of the appellee. If it was of value less than the prior incumbrances the appellees would take nothing by an immediate sale, and as the mortgagor, who was alone personally liable for the mortgage debt, was bankrupt, nothing could be obtained against it upon a judgment for deficiency. So that the loss of the appellees by reason of the stay could not be large.

Accordingly a bond in $10,000, conditioned according to law, was held to be sufficient. The court was not called on to consider, nor did it consider, in the event of the affirmance of the decree and insufficiency of the property to answer the debt, what damages would be recoverable on this small bond. If language was used by the learned chief justice which seems to be applicable to that question, it must be read with reference to the circumstances of the case. Certainly it was not his intention in dealing with the question then before him to overrule a settled doctrine of the court.

The other case is the *Supervisors vs. Kennicott*, 102 U.S. That was an action upon an appeal and supersedeas bond given to suspend the execution of a decree of foreclosure. This decree was recovered in the circuit court upon a mortgage given by the county of Wayne, in Illinois, upon its swamp and overflowed lands to secure an issue of bonds by the Mount Vernon Railroad Company. The chief justice, who delivered the opinion of the court, is very careful to say that "the county was in no way bound for the payment of the debt. It simply mortgaged its lands for the benefit of the company." We are not informed whether the company was impleaded in the bill or not. All that is said is, that a suit was begun to foreclose the mortgage. The learned chief justice then says that "a decree was entered June 25, 1874, finding the amount due from the company on its bonds, and directing that the lands of the county be sold and the proceeds applied to the debt. From this decree the *county* appealed to this court giving the bond sued on." It is not shown

in the statement that the bill prayed or the decree gave a judgment for deficiency against the company, which was the only party liable for the debt, while it does appear that the county alone appealed.

Had the county been liable for the railroad company's debt beyond the mortgaged property, the question would have been that here under discussion But that was not the case. It appealed in respect, not of the debt but of its lands. In its bond it undertook to pay not the debt but "all damages" in connection with the lands, their sale, and the delay thereof. That such was the view of the case taken by the learned chief justice, is apparent from his language. He said: "The appeal of Wayne county was from a decree which subjected its lands to the payment of the debt of the railroad company. By taking the appeal no new obligations were assumed in respect of the debt. Clearly then the damages which the county and its sureties bound themselves to answer must have been such only as followed from the delay in the sale of the property. That does not necessarily imply an obligation to pay the balance which remains of the mortgage debt after the entire proceeds of the lands have been applied to its satisfaction."

This is very different from the case of an appeal by a party bound for the whole debt, who gives a supersedeas bond. According to the rule held from the case in 9 Wheaton to this time, by taking such an appeal a new obligation is assumed in respect of the debt, and it implies an obligation to pay the balance of the debt.

Nor is it material that the party liable for the whole

debt is insolvent. It is evident that that makes no difference in the case of a judgment at law or a decree in equity for an unsecured sum of money. The surety binds himself to pay the whole recovery in case of affirmance, whether his principal be good or not; and unless the words "all damages" mean one thing in one case and another in another case, the same is true where the recovery is partially secured. The Court cannot speculate on the financial condition of the parties.

It is true that the circumstance that the Railroad Company in *Jerome vs. McCarter* was bankrupt was considered material; but, as has been shown, the question there was what the penalty of the bond ought to be; and in fixing it the court might well consider the insolvency of the mortgagor as an important circumstance. But when the bond is given conditioned to pay "all damages" in case the decree is affirmed, the surety cannot escape by saying that the debt which he has secured could never have been collected of his principal.

IV.

But if the recovery of the plaintiffs be limited by the terms of the bond, as prescribed by the statute, the judgment should have been for the full amount of the penalty.

1. Let the matter of the use and detention of the property be considered. The decree was rendered on the 8th of May, 1875. It provided for the payment of a mechanic's lien of $10,000, and thereafter for the payment of the mortgage debt, ascertained to be $139,470. The verdict finds the value of the property at that time to have

been $92,500. It is reasonable to suppose that at a sale at that time the plaintiffs would have purchased the property. Had they done so, they would have had the possession of the property pending the appeal, and been in receipt of the rents during that time.

These amounted to		$38,241 95
Interest		6,596 72
Total		$44,838 67
They paid for taxes	$8,308 50	
Insurance	9,434 24	
Repairs	4,502 74	
Interest	3,837 26	
Total disbursements		$26,082 74
Balance		$17,755 93

Had a sale been had at once after the decree, and the plaintiffs been the purchasers, they would have received these moneys.

In *Supervisors vs. Kennecott*, *supra*, that seems to have been considered a proper item of damage. And in *Duncan vs. Mobile & C. R. Co.*, 3 Woods, 597, 602, Mr. Justice Bradley expresses that opinion.

But the items of repairs and interest ought not to be allowed to the defendants out of the rents. In their answer, they say that a condition of the stay of execution by the terms of the decree was the payment of taxes, assessments and insurance—the object of the court being to preserve the property under all contingencies to the plaintiffs in the decree; as it was because this property stood as their indemnity that the penal sum in the bond was reduced to $50,000. To credit the de-

fendants with what they paid for their own purposes is not reasonable. For the damages arising to us by detaining the property we were entitled to $44,838.67.

2. Let the matter of interest on the mortgage debt as ascertained by the decree be considered. That was found by the jury to be, with accumulated interest, $58,870.25. Not only was this expressly provided for by the bond which the defendants framed and gave, but it is within the damages secured by the statute.

3. An expression in the judgment in *Jerome vs. McCarter* is seized upon to support the contention that difference between the increase in the value of the property and of accumulation of interest pending the appeal is our damages. We think that is not a correct statement of the law, nor a fair reading of the language of the opinion. But in that view of the case it stands thus:

Interest pending the appeal		$50,209 20
Value at date of sale	$139,000	
" " " decree	92,000	
Increase		$46,500 00
		$ 3,709 20
Costs in former case		520 00
" on appeal		293 47
Use and detention found by jury		44,838 67
Amount of damages on that theory		$49,221 34

4. But we submit that the bond should be read as a voluntary agreement of the parties to pay the several items therein mentioned without regard to the statute, naming:

1—For the use and detention of the property..$38,241 95
2—The costs of suit 530 00
3—The costs of appeal..... 293 47
4—Interest on the appeal..... 50,209 20

5. But if this common law obligation is to be limited by the terms of the statute, the damages are the deficiency of the proce ds of the property to pay the whole debt. That deficiency was $88,480.65.

J. M. WOOLWORTH,
Of Counsel for Original Plaintiffs.

17-378

OFFICE SUPREME COURT U. S.
FILED
APR 9 1883
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

THE OMAHA HOTEL CO., SMITH S. CALDWELL, CHARLES W. HAMILTON, SYLVANUS WRIGHT, E. D. PRATT, AND GEORGE E. BARKER,
Plaintiffs in Error.

vs.

AUGUSTUS KOUNTZE, THOMAS WARDELL, AND JAMES W. BOSLER,
Defendants in Error.

No. 244.

AUGUSTUS KOUNTZE, THOMAS WARDELL, AND JAMES W. BOSLER,
Plaintiffs in Error,

vs.

THE OMAHA HOTEL CO., SMITH S. CALDWELL, CHARLES W. HAMILTON, GEORGE E. BARKER, E. D. PRATT, AND SYLVANUS WRIGHT,
Defendants in Error.

No. 247.

In Error to the Circuit Court of the United States for the District of Nebraska.

Brief of the Omaha Hotel Company, Smith S. Caldwell, Charles W. Hamilton, George E. Barker, E. D. Pratt, and Sylvanus Wright, Plaintiffs in Error, and of same, Defendants in Error.

JOHN I. REDICK, *Attorney.*

About the year 1870, the Omaha Hotel Company, a corporation that was then possessed of two lots in Omaha, being lots one and two, in block one hundred and thirty-eight, commenced the erection of a hotel and expended about one hundred thousand dollars thereon, and in September, 1871, for the purpose of carrying on the enterprise, issued its one hundred bonds of one thousand dollars each, payable to bearer within five years from date, drawing interest at 12 per cent. per annum, payable semi-annually; and, to secure the payment of bonds, executed a mortgage upon said lots and property, which was duly acknowledged and recorded.

Wade, Bosler, Wardell, Creighton, Poppleton, Kountzes, and Yates became the holders of said bonds, and default being made by the company in the payment of the principal or interest of said bonds suit was commenced by them in the United States circuit court for the district of Nebraska to foreclose said mortgage, and on the eighth day of May, 1875, a final decree taken against said company, and Smith S. Caldwell, Charles W. Hamilton, George E. Barker, E. D. Pratt, Sylvanus Wright, John I. Redick, Clinton Briggs, and A. S. Paddock who were impleaded in said cause as

subsequent incumbrancers, from which decree an appeal was prayed and taken to this court, and a bond filed under Rule 29, superseding said decree. This court afterwards, on the 11th day of February, 1878, affirmed said decree, and on the 26th day of February, 1878, its mandate was filed in the court below.

This suit was brought upon that supersedeas bond on the first day of December, 1879, against the Omaha Hotel Company, Barker, *et als.*, who were sureties on said bond. It will be observed by the court that the petition in that suit makes but three *material* issues, namely:

First. "That on the eleventh day of May, 1875, and for a month thereafter, the mortgage premises were of the full and fair value of, and would have sold for, one hundred and fifty thousand dollars and over." *Second.* "Between that date and the 26th of February, 1878, the said mortgage premises had depreciated in value thirty thousand dollars by reason, 1st, of falling out of repair; and, 2d, the general depreciation of real estate in said city," and, *Third.* "The use and detention of the premises pending the appeal were of the value of thirty thousand dollars," and claimed the forfeiture of said bond and interest thereon, and asks a judgment of seventy-five thousand dollars.

Now the answer of defendants puts in issue, directly, the three propositions above quoted, as follows:

1. "Defendants deny that the rental value of said premises pending said appeal was thirty thousand dollars."

2. "Deny that between the 8th of May, 1875, and the 18th of April, 1878, said premises depreciated in value thirty thousand dollars, by reason of the falling out of repair, but alleges the fact to be that during that time, and prior thereto, these defendants kept said premises in first class condition and repair, and to that end and purpose, and for its protection and preservation, expended upon said premises between

thirty and forty thousand dollars; and deny that said premises during that time have depreciated thirty thousand dollars, by reason of the general depreciation of real estate in said city of Omaha, but allege it was worth more, and sold for more in April, 1878, than it was worth, or would have sold for in May or June, 1875, or at any time intermediate or between said dates."

Replication was filed to said answer, and at the January term, 1880, the cause was submitted to a jury to try these issues, who, under the direction of the court, made special findings, as appears on page 9 of the record. And judgment was rendered by the court on the 29th day of May, 1880, against said Hotel Company *et als.*, for $19,735.19 and costs of suit, from which judgment writs of error have been prosecuted to this court.

Now, we contend, that the first, second, third, and seventh findings of the jury are the only ones that are proper to be considered by this court, as they are the only ones that determine the exact issues made by the pleadings in the court below.

In finding second, the jury say: "On the eighth day of May, 1875, the property was worth $92,500," (not $150,000 as alleged in the petition.) That settles the first issue.

In the same finding, the jury say, not that the premises had *depreciated* in value $30,000, as the petition avers, but that "on the eighteenth of April, 1878, the premises were worth $139,000 by reason of the *increase* of the value of said premises," the jury undoubtedly finding the allegation in the answer true, viz., "that the defendants pending said appeal spent $30,000 or $40,000," which increased its value that much. That settles the second issue in the petition.

In the third finding, the jury say: "In May, June, or

July, 1875, the premises would have sold for but $62,000," and the record shows, (page 3,) in paragraph number five, in the petition in the court below, the premises sold on the 18th of April, 1878, for $120,000. This settles and determines, in our judgment, the issues as to the difference between what the property would have sold for in May, June, or July, 1875, ($62,000,) and what it would have sold for, and what it did sell for, in April, 1878, ($120,000,) almost double.

In the first finding of the jury, as follows:

"1. We, the jury, impanelled and sworn to try this case, do find that the rental value of lots 1 and 2, in block 138, in the city of Omaha, with the improvements thereon, was, from the 21st of July, 1875, to May 8th, 1878, the sum of $38,241.95, on which sum interest at the rate of ten per cent. per annum from the receipt thereof to this day is the sum of $6,596.72, and the defendants paid during said period for taxes $8,308.50, and insurance, $9,434.24; necessary expenses in renting premises, and for necessary repairs, $4,502.74; interest thereon, $3,837.26.

SAMUEL G. OWEN,
Foreman."

they fix the total amount of rents collected between July, 1875, and April 18th, 1878, to be $38,241.95—the interest on that sum to date of trial $6,596.72, making $44,838.67; and find the necessary expenses paid by defendants, on the premises, including taxes, insurance, etc., and interest thereon, to be $26,082.74, leaving the rental value, pending the appeal, not $30,000, as is alleged in the petition, but $18,755.92.

Now, in our judgment, this settles every issue made by the pleadings.

For illustration, let us state an account between the Hotel

Company and the mortgagees, looking at it in several views, so far as regards the legal rights of the parties, viz:

First. If the plaintiffs are entitled to recover for rents and profits, the account stands thus:

OMAHA HOTEL COMPANY,
IN ACCOUNT WITH PLAINTIFFS.

	Dr.	*Cr.*
To proceeds of sale in 1875	$62,000 00	
" interest on that sum to April 18, '78	18,600 00	
" rents and profits, after deducting expenses	18,755 92	
Total	$99,355 92	
By proceeds of sale April 18, 1878		$120,000 00
Deduct		99,355 92
Plaintiffs have gained by delay		$20,644 08

Second. If plaintiffs are not entitled to rents and profits, the account stands thus:

OMAHA HOTEL COMPANY,
IN ACCOUNT WITH PLAINTIFFS.

	Dr.	*Cr.*
To proceeds of sale in 1875	$62,000 00	
" interest to April 18, 1878	18,600 00	
Total	$80,600 00	
By proceeds of sale April 18, 1878		$120,000 00
Deduct		80,600 00
Plaintiffs have gained by delay		$39,400 00

Third. Placing on the mortgaged premises the *value* in

1875 fixed by the jury, and not the amount they found it would have brought at forced sale in that year, and the account would stand thus:

OMAHA HOTEL COMPANY,

IN ACCOUNT WITH PLAINTIFFS.

	Dr.	*Cr.*
To value of premises in 1875.....	$92,500 00	
" interest to April 18, 1878,....	25,874 28	
Total.....	$118,374 28	
By proceeds of sale in 1878.....		$120,000 00
Deduct.....		118,374 28
Gain to plaintiffs by delay.....		$1,625 72

We cannot see by what process or deduction plaintiffs conclude they have been damaged by delay.

The mortgage premises was all the property that the Hotel Company had at the time of the rendition of the decree, May 8, 1875, and the complainants could have made no more out of their debt than $92,500, according to the finding of the jury, if the bond had never been given. All over that due from the Hotel Company at that time was lost. Now, if the company was entitled to that amount on May 8, 1875, in order to save them harmless from all damages occasioned by the delay, they should receive, including interest, $118,374.28; but they received $120,000 in cash. But if, instead of this sum, the sale had been for only $92,500, then the sureties would be liable for damages to the extent of the interest on that sum, $25,874.28, and during the stay, if the security had been swept out of existence, the measure of damages would be the value, $92,500, and interest for that time, making in all $118,374.28. In no view have they lost a dollar by the delay, but gained, by the improvements

made upon the property and otherwise, from $1,600 to $39,000. It may be said that had there been no supersedeas the mortgagees may have purchased the property at a low price, and then have had the benefit of the advance. This court, in the case of Jerome *v.* McCarter, (21 Wallace, page 17,) has answered this objection: "The appellee may lose the opportunity of bidding in the property at a reduced price, and speculating upon its rise, but the loss of such profits is not recognized by the court as legitimate damages for the delay." This court, in the same case, has held that the object of an appeal bond is to provide indemnity from loss, and that loss is ascertained from the circumstances in each case. Loss, this court says, is what indemnity must be taken for, and what the loss *is* will depend upon the facts, though the rule says that indemnity is to be taken to secure the interests on the appeal, costs, &c.

Rule 29 is simply a matter of procedure; its language is addressed, by the Supreme Court, to the several circuit courts and to one single point, and that is to the amount for which the indemnity shall be taken; that is, what amount shall be inserted in the bond as its penalty. This is for the purpose of securing uniformity in practice.

The measure of damages, as a condition of the bond, is not referred to in the rule, and for that matter is fixed by law; but the measure of the sureties' liability on the bond is a very different question.

The court says, in the case before cited, "In any suit brought on any such bond, it follows, of course, that the obligor is at liberty to show that no damage has been sustained, or partial damages only, and for such amount only is the obligee entitled to judgment."

If the judgment debtor had nothing out of which any part

of the judgment could have been made at the time he superseded it, then no damage has been occasioned by the supersedeas. They are not sureties for one cent of the debt, nor are they sureties for one cent of the interest pending the appeal; but they are sureties for the damages only and the costs.

RULE 29 recites the act of 1789, and requires the condition of the bond to be the same as fixed by law. It matters not what the conditions of the bond are beyond the requirements of the law; the *liability* of the bondsmen is just the same.

In United States *v.* Brown (1 Gilpin, Circ. Ct.) the court says: "Where a statute authorizes a bond to be taken in a prescribed manner, or for certain expressed purposes, and declares that if it be not so taken the bond shall be void, then it shall not stand good for any purpose, however lawful in itself, if it be not conformable to the statute; but when the statute only directs the condition of the bond, and does not avoid it if it should not conform to the directions, and something more than that condition is added to it, the bond may be allowed to cover the authorized part of the conditions, and so much may be recovered, *and no more.*"

The circuit court had no authority to take any other or different bond than the one required by law. The bond in suit, it will be observed, provides, in the language of the law, for a case like the present, but goes further than was necessary, and uses the language of the statute intended to cover almost every class of judgment and decree. That portion of the bond should be treated as surplusage. By it the Hotel Company received no greater rights as to the appeal or supersedeas than they would have had without it. The mortgagees sustained no more loss or damage than if it had

not been there, and we submit the sureties assumed no greater liability on account thereof.

Now, have we not shown beyond peradventure, by the findings of the jury, that the defendants in error have suffered no damage at all but have been benefited by the improvements made on the property, pending such appeal, thirty or forty thousand dollars, as well, also, as by the appreciation of the property to the amount of several thousand dollars more?

The court will observe that the jury, in its seventh finding, determined the allegation in the answer that the Hotel Company had no other property except the property covered by the mortgage: the finding is:—"7. We, the jury, do further find that the Omaha Hotel Company on the 8th day of May, 1875, was and ever since has been insolvent, and possessed of no property aside from said lots one and two, in block one hundred and thirty-eight, in the city of Omaha, out of which any judgment could have been collected." So no damages could have accrued to them by the supersedeas, in preventing them from collecting any deficiency that might have been found after the sale of the property, as the jury has said by its finding said company had no other property but their lots.

Our construction of the 29th Rule is this: 1st. If the judgment or decree appealed from had been one for possession, as in ejectment, then the damages would have been for the use and possession, and costs—that would be what the law means when it says "just damages for delay."

2nd. If it had been a money judgment which was superseded, the damages would have been the amount of the judgment, legal interest, costs of the suit, and costs of appeal —that would be damages, costs, and interest on the appeal, but—

3rd. In a case like the one at bar where the decree is the enforcement of a lien against real estate, and is superseded, the depreciation of the value of the security below what could have been made on the debt if the supersedeas had not been filed, interest on that depreciation and costs is the measure of damages. But, as this court in a late decision of *Wayne County* v. *Kennicott*, in the last of Otto, has put a proper construction upon Rule 29, we will pursue this discussion no further. In that case the court says, as one reason for the conclusion then reached, that for aught the court knew, the mortgage property may have *appreciated* instead of depreciating, pending the appeal.

The case referred to, however, arose under the laws of the State of Illinois, which declare the common law doctrine that the mortgagee has both the legal title and the right of possession.

The statutes of Nebraska provide that in " the absence of stipulations to the contrary the mortgagor retains the legal title and right of possession." (See compiled statutes of Nebraska, page 394, section 55) until sale is confirmed :—

See 4 Nebraska, page 318, Webb *v.* Hoselton.
10 " " 301, Ins. Co. *v.* Lovett.

As it is not pretended by the plaintiff's petition that the mortgage contained any such stipulation, the mortgagees were, therefore, *never* entitled to the possession of the property.

If the mortgagees never were entitled to the possession of the premises, how can it be claimed that they are entitled to recover for rents and profits which go with the possession ?

If such a claim is attempted to be predicated upon the

presumption that at the sale the mortgagees would have become the purchasers, and, as such purchasers, secured the right of possession, &c., we think the case of Jerome *v.* McCarter, (21 Wallace, page 17,) where this court says that "the appellee may lose the opportunity of bidding in the property at a reduced price and speculating upon its rise, but the loss of such profits is not recognized as legitimate damage for delay," supplies an answer and objection to the claim at once strong and decisive.

Then, again, will not the distinction between proximate and remote damages be recognized as fully in actions upon a bond as in any other proceeding where damages are asked? And are not damages for rents and profits which might have accrued from possession of the property, if the mortgagees should happen to have been the successful bidders at a public sale, too remote and contingent to be for a moment considered as "just damages for delay?"

We submit, then, that under the finding of the jury the plaintiffs in the court below were in no manner damaged, but, on the contrary, profited by the delay caused by the supersedeas, and that the judgment of the court should have been for the defendants.

All of which is most respectfully submitted.

JOHN I. REDICK,

Solicitor for the Omaha Hotel Co., et al.

17-378

SUPREME COURT U.S.
FILED
APR 9 1893
JAMES H. McKENNEY, CLERK

Supreme Court of the United States.

THE OMAHA HOTEL COMPANY ET AL.
Plaintiffs in Error,

vs.

AUGUSTUS KOUNTZE ET AL.,
Defendants in Error.

GEO. E. PRITCHETT,
Attorney for Plaintiff in Error, Wright.

R. O. POLKINHORN, PRINTER, WASHINGTON, D. C.

Supreme Court of the United States.

THE OMAHA HOTEL COMPANY ET AL.
Plaintiffs in Error,

vs.

AUGUSTUS KOUNTZE ET AL.,
Defendants in Error.

Statement of the Case.

In 1875, the defendants recovered a decree of foreclosure against the plaintiff, The Omaha Hotel Company and others, for the sum of $139,470. The Hotel Company took an appeal from such decree to this court, where, in 1878, the decree of foreclosure was affirmed. To supersede said decree, pending the appeal therefrom, the plaintiffs executed the following bond:

Know all men by these presents that we, The Omaha Hotel Company, as principal, and S. S. Caldwell, Charles W. Hamilton, George Barker, E. D. Pratt, Sylvanus Wright, as secureties, are held and firmly bound unto Jeptha H. Wade, James W. Bosler, Thomas Wardell, John A. Creighton, administrator of the estate of Edward Creighton, deceased, Andrew J. Poppleton, Augustus Kountze, Herman Kountze, and Henry W. Yates, in the full and just sum of fifty thousand and five hundred dollars, to be paid to said Wade, Bosler, Wardell, Creighton, administrator, Poppleton, Kountze, Kountze and Yates, their certain attorney, execu-

tors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, and the successors of said Omaha Hotel Company, jointly and severally, by these presents. Sealed with our seals and dated this 11th day of May, A. D. 1875.

Whereas lately, in a cause in the Circuit Court of the United States for the district of Nebraska, in equity, depending in said court between said Jeptha H. Wade and James W. Bosler, plaintiffs, and the said Omaha Hotel Company and E. D. Pratt, S. S. Caldwell, Chas. W. Hamilton, Joseph Barker, Jr., Sylvanus Wright, Algernon S. Paddock, Clinton Briggs and John I. Redick, and *and* others impleaded with it, a decree was rendered against said hotel company et al. said defendants; and said hotel company, in open court, prayed an appeal from said decree to the Supreme Court of the United States, which appeal was allowed by said circuit court.

Now, the condition of the said obligation is such that if the said Omaha Hotel Company shall duly prosecute said appeal to effect, and pay said Jeptha H. Wade, James W. Bosler, Thomas Wardell, John A. Creighton, administrator of the estate of Edward Creighton, deceased, Andrew J. Poppleton, Augustus Kountze, Herman Kountze and Henry W. Yates, their executors, administrators or assigns, for the use and detention of the property covered by the mortgage in controversy in this suit, during the pendency of said appeal, and the costs of the suit, and just damages for delay, and costs and interest on said appeal, if it fails to make good its plea, this obligation shall be void; otherwise to remain in full force and virtue.

THE OMAHA HOTEL CO.,

[SEAL.] By S. S. CALDWELL, *President*,
GEORGE E. BARKER, *Secretary*,
S. S. CALDWELL,
CHAS. W. HAMILTON,
GEORGE E. BARKER,
E. D. PRATT,
SYLVANUS WRIGHT.

The mortgaged property having been sold under the foreclosure decree, and there being a large deficiency, the defendants brought suit upon this bond against the plaintiffs, and recovered a judgment against the plaintiffs for $19,735.93; and it is this judgment which plaintiffs ask this court to reverse by these proceedings in error.

The petition upon the bond alleges the recovery of the decree in the foreclosure case; the appeal, the execution of the bond, "according to the course and practice of the court, and the acts of Congress in such case made and provided;" that the decree was superseded thereby; the affirmance of the decree, and the sale of the mortgaged property in 1878 for $120,000, and the awarding, by the circuit court, to the defendants, of execution for $88,480.65 deficiency, and that such execution was issued and returned unsatisfied by the marshal; that in 1875, the mortgaged property was worth $150,000; that between 1875 and 1878, the mortgaged property depreciated in value $30,000, and that, pending the appeal, the use and detention of the mortgaged property were of the value of $30,000. The answer alleged that the mortgage was made by the Hotel Company, which was a corporation created for the sole purpose of erecting and operating a hotel in the city of Omaha, and for no other purpose; and that it was not the owner, and never had been, of any property other than that embraced in the mortgage, and that the Hotel Company was insolvent; denied that the rental value, pending the appeal, was $30,000, or that the property had depreciated in value, pending the appeal, but alleged that it was of greater value in 1878 than in 1875, and that, pending the appeal, the plaintiffs had expended large sums in repairs upon the mortgaged premises.

The cause was tried to a jury, which rendered a special verdict, as follows:

In the United States circuit court, dist. of Nebraska.

AUGUSTUS KOUNTZE ET AL.
vs.
THE OMAHA HOTEL CO. ET AL.

1. We, the jury, empanelled and sworn to try this cause, do find that the rental value of lots 1 & 2, in block 138, in the city of Omaha, with the improvements thereon, was, from the 21st of July, 1875, to May 8th, 1878, the sum of $38,241.95, on which sum interest at the rate of ten per cent. per annum from the receipt thereof to this day is the sum of $6,596.72.

And the defendants paid, during said period, for taxes $8,308.50; and insurance, $9,434.24; necessary expenses in renting premises, and for necessary repairs, $4,502.74; interest thereon, $3,837.26.

SAMUEL G. OWEN, *Foreman.*

2. We, the jury, do further find that *that* the value of the said premises on the 8th day of May, 1875, was $92,500.00; interest on said sum from the said 21st day of July, 1875, to May 8th, 1878, is $25,874.28, and that interest thereon from May 8th, 1878, to this day, at 10 per cent. per annum, amounts to the sum of $4,463.26; and the value of the said premises, on the 18th of April, 1878, was $139,000.00, by reason of the increase of the value of said premises.

SAMUEL G. OWEN, *Foreman.*

3. We, the jury, do further find the said premises would, at a master's sale thereof in May, June or July, 1875, have sold for $62,000.00, and the interest on which sum, from the 21st day of July, 1875, to May 8th, 1878, amounts to the sum of $17,342.76, which sum, with interest thereon from May 8th, 1878, to this day, amounts to $20,334.35.

SAMUEL G. OWEN, *Foreman.*

4. We, the jury, do further find that the interest on $139,470, at 12 per cent. per annum, from May 8th, 1875, to the 8th of May, 1878, amounts to $50,209.20, and that sum, together with interest on the same, at 10 per cent. per annum, from said last day to this day, amounts to $58,870.25.

SAMUEL G. OWEN, *Foreman.*

5. We, the jury, do further find that $50,090, together with interest thereon, at 10 per cent. per annum, from July 11th, 1878, to this date, is $57,750.00.

SAMUEL G. OWEN, *Foreman.*

6. We, the jury, do further find that the amount of costs of the case of Wade and others vs. The Omaha Hotel Co. and others, which are unpaid by the defendants, is $530.00.

SAMUEL G. OWEN, *Foreman.*

7. We, the jury, do further find that The Omaha Hotel Company, on the 8th day of May, 1875, was, and ever since has been, insolvent, and possessed of no property aside from said lots one and two, in block one hundred and thirty-eight, in the city of Omaha, out of which any judgment could have been collected.

SAMUEL G. OWEN, *Foreman.*

8. If, upon the pleadings and the above facts, the plaintiffs are entitled to recover, we, the jury, assess their damages at such sum as they are, upon the said pleadings and findings, entitled to recover.

SAMUEL G. OWEN, *Foreman.*

Upon the pleadings and this special verdict, the circuit court rendered the judgment against the plaintiffs, which they ask this court to reverse.

Assignment of Error.

The plaintiffs say there is error in the record and proceedings of the circuit court, in this, to wit: That the judgment of the circuit court should have been for the plaintiffs instead of for the defendants, because, from the pleadings and the special verdict of the jury, it clearly appeared that the defendants had sustained no damages by reason of the supersedeas effected by the bond sued upon.

Argument.

Section 1000 of the Revised Statutes provides that, in order to supersede a judgment, the plaintiff in error shall give security to prosecute his appeal to effect and if he fail to make his plea good, to "answer all damages and costs." While this bond is not conditioned, as required by the statute, and was a void bond, yet, as it was the intention of the parties who executed it to give a lawful supersedeas bond, it should be so treated by the court, and the obligation of the plaintiffs thereunder held to be no greater and no less than it would have been had the bond been conditioned according to law. The bond operated to supersede the judgment; its effect was just the same, in all respects, as if it had contained the statutory condition; and the advantage to the appellant, if any, and the disadvantage to the appellees, if any, were just the same—no more, no less.

The mistake was made of inserting, as the *condition* of this bond, a part of Rule 29 of this court, which is simply a direction to the circuit courts on the subject of fixing the *amount* of the indemnity to be taken. We insist that the bond should be treated as if conditioned to pay "all damages and costs," as the statute requires. The defendants, in their petition upon the bond, allege that it was given according to the rules and practice of the court and the acts of Congress in such cases made and provided; and the plaintiffs, in their answer, admit that allegation to be true. Thus, a worthless bond is made good by the pleadings, that is, by admissions of record.

It is very plain what the intention of the parties was in giving this bond, and how it should be construed. As this court said, in the case of 3 Cranch, 235: "There are many cases on the construction of bonds where the letter of the condition has been departed from to carry into effect the intention of the parties." And to the same effect are the

cases of *Swain* vs. *Graves*, 8 Cal., 549, and the case of *Ward* vs. *Buell*, 18 Ind., 104, where the court say: "Any instrument in writing, however defective, which the parties execute for the purpose of staying execution on appeal, and the officer accepts for such purpose, will have the force and effect of an appeal bond."

Any obligations of an appeal bond which are additional to those required by statute are void.

Tomlin vs. *Green*, 39 Ill., 225.

The bond, then, being construed as if it was conditioned to answer "all damages and costs," does the record show that the defendants suffered any damages by reason of the supersedeas? This court said, in *Catlett* vs. *Brodie*, 9 Wheat., 553, in speaking of the statute: "The word 'damages' is here used, not as descriptive of the nature of the claim upon which the original judgment is founded, but as descriptive of the indemnity which the defendant is entitled to receive, if the judgment is affirmed."

What does indemnity mean? "Security given to save harmless; a writing or pledge by which a person is *secured against future loss*."

The word "damages" means nearly the same thing: "The estimated reparation in money for detriment or injury; that which is given or adjudged to repair a *loss*."

So, then, we say that if the defendants suffered any *damages*, or, in other words, suffered any *loss*, by reason of the supersedeas, the plaintiffs are liable on the bond; but if, from the pleadings and special verdict, the fact appears that they did not suffer any loss by reason of the supersedeas, they are not liable, and the judgment of the circuit court in this case was erroneous and must be reversed. It would seem as though this court had pretty well settled the question as to what the loss of a mortgagee could be

by reason of superseding his decree of foreclosure, in the cases of *Supervisors* vs. *Kennicutt*, 13 Otto, 555, and *Jerome* vs. *McCarter*, 21 Wall., 17; and shown that such loss depends upon the facts.

Facts Found by the Jury.

The jury say, in finding 7, that the hotel company was on May 8, 1875 (date of decree), and ever since has been, insolvent, and possessed no property aside from lots 1 and 2 in block 138, in Omaha (mortgaged property), out of which any judgment could have been collected.

The company, the mortgagor, not having any other property at the time the bond was filed (May 14, 1875), nor since, of course no part of a deficiency judgment could have been collected as provided in equity rule 92. If a sale of the mortgaged property had taken place in 1875 or since, the mortgagees would have received on their claim the amount of money for which the property would have sold. If after the application of this money there was a deficiency of say $100,000, more or less, every cent of it was forever lost, because the mortgagor had nothing out of which any of it could have been made, for the mortgagees had taken the precaution to cover by their mortgage anything which the company owned or had any interest in. It could not acquire property like a natural person; it was authorized by law to do a particular thing, and having done this its work was at an end. The results of this work were covered by the mortgage.

Supersedeas or no supersedeas, all the mortgagees could ever realize on their debt was the proceeds of the property at a forced sale. All the company had was all they could get, and they have got it (and a good deal more). Total insolvency, the court said in the case last cited, justified the justice in taking indemnity in a very small sum.

Therefore not a cent of damage has resulted to the defendants by reason of not being able to sell in 1875, as at that time and ever since a deficiency judgment would have been worthless.

2. In finding 6 the jury say the unpaid costs in the foreclosure suit amount to $530. What costs do the obligors undertake to pay? Certainly not the costs incurred in the circuit court. These costs were incurred *before* the bond was filed. The supersedeas did not cause these costs to be incurred, nor did it make them more or less. These costs were *lost before* the bond was filed, the company being worthless. Hence as to this matter the bond did not hurt the obligees.

The costs referred to in the act are costs which accrue in the supreme court subsequent to the decree. So this item of $530 must go out of the case.

3. Findings 4 and 5 are wholly immaterial. Interest upon the decree is not, as a matter of law, the measure of damages. This interest, as such, in no way concerns the sureties, but it is *damages* they are to answer for, and this depends upon the *facts*, so says the supreme court. No *fact* is found in these findings except that on such a sum, at such a rate, for such a time, the interest amounts to so much. Of course.

This interest theory *assumes* that the defendants lost $50,000 of 12 per cent. interest because of the bond. But they can't lose what they never had. They *assume* that the property would have sold for the face of the decree ($139,470) in 1875, and that they must have 12 instead of 10 per cent., but neither is true. Nor can it be assumed, as a matter of law, without an inquiry into the facts, that this interest is *lost* because of the bond. We have before shown that this will not do; we therefore dismiss these findings as immaterial.

4. One other finding, the first, has no business here. How does this finding of the rental value of the mortgage security tend to enlighten the court as to the measure of damages? The mortgagees never claimed to be the *owners* of this property; all they ever claimed was a specific lien upon it to secure their debt. And even now, by their reply, they stoutly deny that they have any interest in the property. The Hotel Co. was the owner of this property until its title was divested by the master's sale in 1878, and to it, as such owner, belonged the rents and profits. The laws of Nebraska give the possession and rents to the mortgagor. In

a proper case, pending the foreclosure, the court may appoint a receiver to collect the rents and hold them to be applied on the debt, or the mortgagee may take possession for that purpose, but nothing of this kind was ever done in that suit. This decree only authorizes a sale and application of the money arising from it. If any rents have accumulated in the hands of the company pending the appeal, they are assets, and can only be reached under proceedings upon the deficiency judgment. The sureties on this bond do not undertake to pay any rents or rental value no more than they do interest; but they simply agree to answer for all damages and costs.

If the case had been ejectment where the plaintiff claimed title and possession, then it would be pertinent in case of a suit on a supersedeas bond which kept the defendant in error out of possession, to inquire into the value of the use of the property, for that is just what he has lost by the delay, and costs. The same rule would apply in replevin and other actions where title and possession are involved. But in suits on mortgages title is never involved. Rents are incident to the ownership of that out of which they result, the owner of a specific lien upon property, as a mortgagee, is not entitled to the profits of the security.

If a sale had taken place in 1875 the mortgagees would not thereafter have received these rents, but the purchaser at the sale, the then owner, would be entitled to them. It may now be said that the mortgagees might have bid in the property and thus become entitled to the rents. But this is too uncertain a presumption upon which to determine the rights of parties, especially as there is nothing in the record tending to show that they would have made the purchase. Their emphatic denial in their reply that they purchased the property at the master's sale in 1878, does not very much tend to show that they would have made the purchase in 1875.

Besides, when a mortgagee bids in property in this way, he, after the purchase, assumes the character of a purchaser and drops that of mortgagee, and thereafter he has no more nor less rights than a stranger. The latter certainly could not hold these sureties liable for rents which he might have received had he been permitted to bid in the property in 1875. Therefore we find no *facts* upon which damages can be predicated. Findings 2 and 3 alone remain to be considered.

5. All we need do is to show that the defendants have sustained no damages by reason of this bond, and to do this, finding No. 3 need not be considered. Instead of there being any damages, this finding shows that the supersedeas resulted in an advantage to the defendants of $40,657.24. We think the facts there found, together with the allegations of the petition, that the property in April, 1878, at master's sale, sold for $120,000, are the only just and logical basis upon which to reach a conclusion. But as another view of the case will dispose of it, we will not further discuss this finding, but proceed to consider finding No. 2, the only one left.

6. It will be remembered that the defendants in their petition, tender us the issues respecting the value of the mortgaged property in 1875 and 1878. They allege it was worth $150,000 at the former, and only $120,000 at the latter date; hence large damages by reason of this depreciation. The answer denies this, and alleges the contrary, that the property was worth more, and would sell for more in 1878 than in 1875. The jury find these issues with us, and say that the property was worth in 1875 $92,500 (but that its forced sale value was only two-thirds—$62,000), and that it was worth April 18, 1878, $139,000. The petition alleges that on that day it brought at master's sale $120,000, $19,000 less than its value.

The fact that the property was worth $139,000 at that time we do not propose to take into account, as it is not necessary to our defense; but we now propose to present the case so as to give the defendants every possible advantage, and so as to place the plaintiffs at the greatest possible disadvantage. This we do by balancing the fair value of the property in 1875 ($92,500) against the forced sale value on April 18, 1878 ($120,000). We now assume, in the face of finding No. 3, that the forced sale value was in 1875 $92,500, and we do this in view of the fact that the only way the mortgagees could get any money out of the property was by a forced sale, and that, too, a *cash*, not a credit sale.

Upon this basis the account between the parties in May, 1878, will stand thus:

Value of property in 1875	$92,500 00
Interest on same to May 8, 1879.....	25,874 28
	$118,374 28
Sold at master's sale April 18, 1878, for.....	120,000 00
Gain to defendants	$1,625 00

If the jury had found the facts as alleged in the petition the damages would have been great, but finding as they did, we can say to a certainty that the supersedeas occasioned the mortgagees no loss whatever, but gain rather. If counsel can, by any process of reasoning, show the defendants have *lost* anything, we should like to see how they do it. Will it be said that *depreciation* may be shown to increase, but that *appreciation* cannot be shown to diminish the damages, or show that none have been sustained?

When rendered the decree was worth only $92,500, the value of the security at the time, consequently $46,970 of the debt was *lost* before the bond was filed. The mortgagees should have received this money in 1875, but the supersedeas kept them out of it until May, 1878. Therefore, at this last date, in order to save them harmless from all damages occasioned by the delay, they should receive, including interest, $118,374.28. They got $120,000. But, if instead of this sum the sale had been for only $92,500, then the sureties would be liable for damages to the extent of the interest on that sum ($25,874 28). If the property had sold for only say $75,000, then $17,200 must be added to the $25.874.28; and if during the stay the security had been swept out of existence, so it would have sold for nothing, then the measure of damages would be $118,374.28 (if the penalty of the bond was large enough to admit of it).

It is said we cannot offset rise in value against interest. We do not ask the court by reason of this to give us anything, or take anything from the defendants. All there is of it is a process of reasoning from a given state of facts, such as insolvency of the company; no other property than that covered by the mortgage; value of the property in 1875; in 1878; amount of interest on the $92,500; amount of the rise in value of the property; by all of which we are led to the conclusion that no damages have resulted to the

defendants. Rise in value, like insolvency or any other fact, is only *one* link in a chain of circumstances by which a certain result is reached; it is one of the elements which enter into and form a part of an ultimate fact, that is, *loss or no loss*. Rise in value is a direct, pertinent fact, and inseparable from the case as it now stands, and as much so as insolvency.

To the mortgagees the collection of this debt was purely a matter of money. Having the mortgage security on their hands what they wanted was so to handle it as to make the largest possible amount of money to apply on their debt, especially as the company was insolvent and possessed no other property. The supersedeas bond did not give them a new *resource or additional security for their debt* as defendants and their counsel seem to imagine. This *bond* did not make them any better off; it was not a "bonanza," it was not a subject for *speculation*, but it was simply an indemnity against *loss*. If by giving them the benefit of the large finding, $92,500, and ignoring the small one, $62,000, it then is conclusively shown that the defendants have not *lost*, but have *made* by the delay, how can the court give them a judgment for *damages?*

When the sureties tied up the mortgaged property the only risk they ran was its depreciation. If the company had possessed other property out of which a deficiency could have been made in 1875, then they would have taken the additional risk of its losing or squandering such other property before the mandate should come down; it having none, this latter risk was not incurred. But the property appreciated: the security consequently yielded more money to be applied on the debt than it would have done if there had been no delay. This is somebody's good fortune. Whose? Counsel will say not the plaintiffs; that good luck must always be on the side of defendants. If the plaintiffs were sureties for the *debt and interest* instead of for *damages* only, then neither rise or fall in value would change their liability.

Let us take another view. Suppose the defendants are permitted to recover as damages the interest on either the $62,000 or the $92,500 accruing, pending the appeal, without reference to the fact that the increase in the property in value was greater than the accumulation of interest on either sum, what will be the effect? The effect will be

that the defendants will be permitted to *speculate* out of the bond to the extent of some $25,000; that as they will get just that much more on their debt than they would have received if no bond had ever been given (assuming it prevented a sale). This would be very thrifty business for the defendants; if they can make clear about $25,000 out of this bond, they may well thank providence for their good luck; they can take a solemn oath that they never lost a cent by reason of the bond, and if they get the $25,000 they can solemnly swear that they have made just that much out of the supersedeas.

This is not what the law means when it says that the obligors must answer all damages and costs. It means that the obligees must be put in just as good condition as though the bond had not stopped the sale; no better, no worse. But the defendants want *vindictive*, or at least speculation, damages; we want to give them compensatory damages only. We want to make good their loss, if any; if no loss then we don't owe them anything. The defendants want to *punish* us for taking the appeal; we ask the protection of the court. The defendants suppose a supersedeas bond to be a big mine of wealth. But we find that not one bond in a hundred causes any damages to the creditor; that few cases can be found in the reports of a suit brought to recover damages on such a bond under the national law.

It may be said that had there been no supersedeas the mortgagees might have purchased the property at a low price, and then have had the benefit of the advance. The supreme court, in *Jerome* vs. *McCarter*, has answered this objection: "The appellee may lose the opportunity of bidding in the property at a reduced price, and speculating upon its rise, but the loss of such profits is not recognized by the court as legitimate damages for the delay." Besides, the same answer we gave to the assumption that the mortgagees might have bid in the property in 1875, and thus become entitled to the rents, is just as conclusive on this point.

It is respectfully submitted that the judgment should be reversed, with directions to the circuit court to render judgment for these plaintiffs in error.

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